

JOURNAL
OF THE
SOCIETY OF COMPARATIVE
LEGISLATION.

EDITED FOR THE SOCIETY BY
SIR JOHN MACDONELL, C.B., LL.D.,
AND
EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τὸ τ'ὀρθῶς ἔχον ὁφθῇ καὶ τὸ
χρήσιμον."—ARIST. *Pol.* II. I.

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LORD REAY.

[Contributed by DR. THOMAS BATY.]

Few more many-sided personalities are to be found in the public life of our time than Donald James, eleventh Baron Reay. A Dutch baron, born in Holland of parents long settled there, yet a Scots peer and Chief of the Clan Mackay; an international lawyer and an Indian administrator, an authority alike upon education and on the Territorial forces, a legislator and a *savant*, in society a *persona gratissima*, of distinguished presence, Lord Reay has manifold claims on the public interest and gratitude.

Lord Reay was born at the Hague on December 22, 1839. Sixty-eight years later he attended the Peace Conference there as British Plenipotentiary. Meanwhile his life has been full of varied activity. The descendant of an ancient royalist stock, he came of ancestors who had left Scotland for the Netherlands at the time of the Civil War. There, their military and civil qualities procured them favour and ultimately the title of Baron Mackay of Ophemert. To Baron Eneas, a distinguished Dutch statesman, there thus descended in 1875 the ancient Scottish peerage of Reay. He had married Mary Catherine Anna Jacoba, daughter of Baron Fagel; and when in 1876 he died, their son, the subject of this notice, succeeding to the peerage, became naturalised by Statute¹ in the United Kingdom. At the same time Lord Reay married the widow (*née* Hasler) of Capt. Alex. Mitchell.

Entering into the public life of his adopted country, he was made a peer of the United Kingdom with a seat in the Lords in 1881, and became Governor of Bombay in 1885. He had already been employed by the Netherlands in various public functions: in 1862-5 he was attaché to the Legation at the Court of St. James; he was in the Dutch Colonial Office from 1865 to 1869 (by which time he had acquired a high reputation as an international lawyer); and from 1871 to 1877 he had sat in the second (popular) chamber of the States-General. His excellent and sympathetic work during his Governorship in India has been made the subject of a special treatise by the late Sir William Hunter. It will be sufficient here to say that railway extension in the north, consequent delicate negotiations with native states, and, of course, education, were prominent features of Lord

¹ The Act is not printed, and is indexed as relating to *Donald James Mackay* in the Statutes at Large (40 and 41 Vic. p. 477.)

Reay's administration. The Dukes of Connaught and Clarence passed high encomiums on it from their personal knowledge.

We should not omit to add that in 1881 he had acted as British delegate for India at the International Monetary Conference: his Report is a valuable and often-cited document.

In 1890 he returned to England, became in 1892 Lord Lieutenant of Roxburgh, and acted as Under-Secretary of State for India during the last year (1894-5) of Lord Rosebery's Ministry. Two years later, in 1897, he became Chairman of the London School Board, a post which he filled with universal acceptance for seven years, when the new education authority for London was set up and Lord Reay retired. In the year of his retirement he was elected President of the Institute of International Law, of which he had become an Associate in 1882 and a Member ten years later. The meeting of the Institute was held in Edinburgh, and Lord Reay dwelt in his inaugural address upon the openness of the Scottish mind to new ideas from abroad, and rendered a merited tribute to the philosophic and original genius of Lorimer. At the same time he forecasted the settlement of the thorny question of occasional contraband by an International Congress—a prophecy which has come very near to fulfilment.

Honours now came thick and fast upon him. He was already a G.C.S.I. and I.E. and an honorary graduate of Edinburgh and St. Andrews, and he was in 1905 made a Privy Councillor, a Doctor of Laws of Aberdeen, and a Doctor of Letters of Cambridge. In 1906 he became a Doctor of Letters of Oxford. He is also an LL.D. of Glasgow. His interest in learned societies has always been great. He was at one time secretary for abroad of the Royal Geographical Society, was Lord Rector of St. Andrews, 1884-6, and has presided over the Social Science Congress, the Asiatic Society, the Franco-Scottish Society, and the British Academy (of which he was the first President, 1902-7). His inaugural address at St. Andrews was on "University Reform," and urged the co-ordination of general and professional education.

Last year Lord Reay was created a Knight of the Thistle on the occasion of His Majesty's Coronation visit to Scotland.

In Lord Rosebery's words, Lord Reay is "an earnest, able, and perfectly honest statesman." If his family motto, *Manu forti*, is true of him, the hand is certainly encased in the most silken of velvet gloves. Indians are never tired of descanting upon the ex-Governor's unwearied kindness. Lord Reay's interest in the Society of Comparative Legislation needs hardly to be mentioned here. As one of its first founders, a member of the Council from the beginning and of the Executive Committee since 1901, Lord Reay has placed at its service his wide grasp of affairs, his ripe experience, and his high personal qualities.

THE CROWN COLONIES AND PROTECTORATES AND THE COLONIAL OFFICE.

THE readers of the Journal will—the Editors feel sure—be glad to have the following admirable survey of our Crown Colonies and Protectorates contained in the speech made by the Right Hon. Lewis Harcourt, M.P., in the House of Commons, on June 27, 1912, on the Colonial Office Vote :

I intend on this occasion to take a somewhat unusual course—I hope with the general concurrence of the Committee—in making a preliminary statement.

Last year when the Colonial Estimates were before the Committee, and when I was comparatively new in my office, I pursued the more usual method, and the course of least resistance and least danger, of waiting for comment, criticism, or attack as it might develop by the chance of those who caught your eye, of replying to those questions or criticisms to the best of my ability, and generally after courteous notice from those by whom they were made, and leaving untouched and undealt with all those other matters which had not formed the subject of attack.

I was impressed at the time with the unsatisfactory result of this practice. We ranged, it is true, over a variety of topics with no geographical, administrative, philanthropic, or commercial relation to one another. The searchlight shifted from a cable in the West Indies to the Masai in East Africa, from a railway in Nigeria to a dusky prisoner in Ashanti.

Where there was criticism or curiosity some debate took place, but the better the administration, the greater the prosperity of a Colony, the less attention it received in this House and the less credit it acquired from the public outside.

It seems to me that this is a wrong system.

This is one of the few, perhaps—probably—the sole occasion in the year on which either the House or the country has any opportunity of receiving an account of the stewardship of those to whom it entrusts the Government of the dependencies which are known as Crown Colonies, and it seems to me that those who ungrudgingly—though often ignorantly—pay no inconsiderable share of the cost should at least have the satisfaction of some report of the results which their sacrifices and their servants have attained. I must appeal, however, to the Committee to be merciful to me in my new departure. I am obviously opening to them a far larger field than in the past for comment

and criticism—of which I shall not complain—but if it is discovered that a Colonial Secretary by such procedure presents himself as too extensive or too vulnerable a target—well, my successors are unlikely to follow my example.

I propose in the statement I am about to make to omit any reference to our self-governing Dominions, though, of course, I shall be prepared at a later hour to answer questions which may or can be properly put in relation to their proceedings.

I omit them at this moment for several reasons :

(1) Because the events occurring in them and the policies by which they are directed are fairly well advertised in our press, are under constant survey here, and are on the whole familiar to the students of Imperial affairs.

(2) Because we have only a slight responsibility and no financial liability for the details of their internal administration.

(3) Because the Dominions Blue Book has just been circulated replete with information.

(4) Because the *terra incognita* of the Crown Colonies and Protectorates will occupy at least as much of my time as I shall feel justified in inflicting on the Committee.

The statement I have to make will not be the least entertaining. I shall attain all I can hope if I make it useful and informative. It cannot, I fear, be short and I should strongly advise all those who have no special or specialised interest in such details at once to seek that seclusion granted by other rooms in this building, and I shall be duly grateful if, before I have finished, your attention is not officially drawn to the paucity of my audience. I want, as I said, to deal to-day with the position and prospects of our tropical possessions in the Crown Colonies and Protectorates. In order to illustrate progress or retrogression some definite period must be taken for comparison. I propose to take for this purpose the six years which cover the existence of the present Government. But I shall make no attempt to prove that *post hoc* is *propter hoc*. I would beg honourable gentlemen opposite to believe that I take this as a convenient period only—and a period in which there has been a continuity of administrative thought and action—but with no desire or intention for the manufacture of political or personal capital. I take it also because during this period for the first time the East Africa Protectorate, Uganda, and Somaliland come into the account.

My idea is to sketch as briefly as I can the causes and circumstances of the development, the justification of the cost, and the reason of its reduction ; the material progress and prosperity not only of our Crown Colonies and their trade, but of the conditions of life and labour of those for whom we have undertaken this gigantic responsibility. The position of the Colonial Secretary on the Crown Colony side of his Department carries with it the powers, duties, responsibilities, and anxieties of a practical and laborious despot, controlled only by the forces of Nature, by his own discretion, and by the sporadic curiosity at question time of friends or opponents—inspired

either by imagination or information—and often with the best intentions creating difficulties they wot not of, and not seldom innocently damaging the causes to which they are devoted.

But even a despot under democracy is glad to have an opportunity of justification and of proof that his mild autocracy is not inconsistent with benevolence, or that the machinery of legislation by ordinance or letters patent may in the circumstances of undevelopment be a not unsuitable—though temporary—substitute for more representative methods.

In using the words Crown Colonies I should like to make it clear that I do not employ them in their technical sense. I use them here only to indicate that I am dealing with all British Possessions except India and the self-governing Dominions.

The term Crown Colonies is, technically, inapplicable to many of our possessions—especially to some of the West Indian Islands and British Guiana. It should be clearly understood by the Committee that many of our West Indian possessions have independent legislatures which relieve me of much responsibility, and whose consent must be obtained to expenditure and legislation, and I hope that no offence will be taken if later in my speech I use the words Crown Colonies either by carelessness or for convenience to indicate possessions to which the term is not strictly applicable.

Before I pass to details I should like to give the Committee one inclusive figure of comparison for the period I have selected for review. In 1905-6 the Colonial Estimates voted by this House were £1,260,000; for this year 1912-13 they are £860,000. That shows a total reduction in seven years of £400,000, and for this year my estimates are actually £500,000 less than the previous twelve months.

That does not mean that services have been skimped or needs neglected. The lessened expenditure by this country coincides and is co-existent with (and partly the result of) greater development and prosperity in all our possessions throughout the world. I have considered how I could best present to the Committee the picture I desire to draw of that administrative success and commercial prosperity. The easiest, but not I think the most illuminating, method would be to deal with the circumstances of each Colony in turn; but I do not wish to treat them for my present purpose as disconnected units, but rather as detached parts of a cohesive whole—cohesive in general aim and policy and result, though necessarily varying in the technique of administration, the details of industry, and the speed and quality of their progress.

I think I shall best attain this end by dealing as a whole with certain heads of administration, such as representative government, finance, trade, agriculture, minerals, medicine, liquor, labour, land, railways, opium and the like. In dealing with the various heads I will try to take the Committee an Empire tour, calling only where necessary, starting down the West Coast of Africa, crossing through the Protectorate of South Africa and Rhodesia to

East Africa, looking in at Mauritius, and on by Ceylon to the Straits Settlements and Federated Malay States, and thence, *viâ* Hong Kong, to our possessions in Central America and the West Indies. I note an expression of justifiable alarm on some faces, but I can promise that it shall be a lightning tour, and where Jules Verne took us "Round the World in Eighty Days," I shall hope to compress it into as many minutes. It will save much repetition of dates if the Committee will bear in mind that in all figures I quote and comparisons I make I am using the year 1905-6 for the commencement and the last available year (generally 1911) for the end.

Honourable members may have noticed that I have omitted the Mediterranean. I have done so intentionally because our possessions there hardly enter into my scheme. Of Gibraltar and Cyprus there is little or nothing for the moment to say. Egypt does not come under the purview or the control of the Colonial Office, and Malta stands by itself. In order not to confuse the future statement as to our tropical Colonies I think I had better deal with Malta as a separate and peculiar entity and deal with it now.

Malta is a fortress and a great naval base; it has largely ceased to be a commercial port. It must be held and governed mainly for naval and military purposes, but at the same time with a scrupulous regard for the advantage and the peculiar circumstances of its inhabitants. It is the combination of these conditions which has made it impossible in the past, and makes it still impossible in the present, to give to the island any larger measure of self-government than it possesses to-day. But these limitations impose on us an added responsibility for dealing not only gravely but generously with the situation which results from its unique position.

It would be an exaggeration to say that Malta is in a condition of incipient bankruptcy, but it is not untrue to say that its financial position is one which demands an immediate review and rectification. On my representations a Royal Commission of three able and distinguished men visited the island this winter; they made an exhaustive inquiry, and have just published an impartial and suggestive report. I do not propose to deal with its details to-day. I am anxious first of all to gather the opinions of the Maltese on these recommendations after consideration and reflection. But it will be clear to all who are acquainted with the circumstances that financial equilibrium can only be supplied in the future both by economy in expenditure and readjustment of taxation. Both of these I shall hope to make with competent advice in such a way as to give relief to those who are unduly burdened, and to inflict the least sacrifice even upon the most wealthy.

The conditions of Maltese existence have always been singular. Since the Knights Hospitallers coalesced with those of St. John of Jerusalem, and became the militant conductors of the visitants of the Eastern shrine, the population of Malta have depended largely on outside circumstances and influences for their livelihood.

They are a fertile race living on a circumscribed and infertile land. Their fortunes have ebbed and flowed for a century with the tide of European wars and Mediterranean conquest. Resenting the surrender of the island to Napoleon by their degenerate Knights, they welcomed their British conquerors as deliverers. Their highest interest was to be the vassal of the Mistress of the Seas. For half a century they slumbered under our benevolent and not unprofitable rule, and woke to an artificial and transient glory on the opening of the Suez Canal. Twenty or thirty years ago, with ships of lesser tonnage and smaller bunkers, Malta was an essential coaling station for the traffic to the East; to-day, with greater coal capacity in ships and the facilities of Port Said, she is left in a commercial backwater dependent largely on naval and military policy for her day-to-day prosperity. It has been calculated that the presence of the full Mediterranean Fleet at Valetta secures an expenditure in Malta of upwards of £1,000 a day. But the location of defensive expenditure must depend upon the needs of tactics, not upon the poverty of ports.

When at the beginning of this century great naval and military works were undertaken at Malta, there was produced a state of inflation as unnatural as it was evanescent. The price of labour rose in accordance with its scarcity; workers were imported from Sicily and Italy to meet the actual requirements and the apparent future possibilities; commercial building extended beyond the true economic demands. The administration of the island was not wholly free from the reproach of an extravagance based upon inflation. But the inevitable reaction has come, and with it some suffering to a redundant population. Emigration of those who are both fit and willing for it seems to be indicated as one of the cures, and I am now taking steps to discover what are the countries best fitted to receive and welcome those who are anxious to leave their island home. The cure of the present discontent in Malta can be neither immediate nor rapid, but I hope, on the lines of the Commissioners' report and with a fair amount of local assent, to devise means by which the existence of its inhabitants may be put on an economic and not extravagant basis.

Before leaving the Mediterranean I must say a few—and they will be very few—words about Cyprus.

If Lord Beaconsfield ever made a mistake—and I do not wish at this date, or on this occasion, to introduce so debatable a proposition—it was probably in his acquisition of Cyprus. He regarded it in his own words as a *place d'armes*, from which he thought to fight the battle of Armageddon, and he sent there Sir Garnet Wolseley as our first Commissioner. If he had contented himself with the advice of Mr. Greenwood to buy the Suez Canal shares and abandon his Armageddon he would have been a better friend to the British Treasury, though a less munificent benefactor to the people of Cyprus.

The tribute which is still exacted from them as part of the Ottoman

Empire is on the same scale and at the same amount as that which they were paying on their transfer, but the island is profiting to-day by a fixed payment of £50,000 per annum from this country towards its development.

In past years the grant-in-aid has varied in accordance with the balance of revenue and expenditure, but the new arrangement of a fixed subvention for a term of years has enabled the island Government both to raise taxation and to make economies without fear that the results—if successful—should reduce the burden on the occupying Power rather than inure to the advantage of the inhabitants. In the last six years its revenue has risen from £238,000 to £363,000 and its total foreign trade from £966,000 to £1,240,000. It is true that some part—perhaps a large part—of this may be due to the exceptionally abundant rainfall of those years, and that we may have to anticipate a dry cycle; but in any case I believe the figures I have given indicate a real and permanent increase in prosperity.

The improved financial position has enabled us to quadruple in that period the expenditure on the conservation and development of forests, and though the returns are at present slight, they promise a serviceable future yield both in cash and in water-supply.

Some expenditure out of surplus is being rightly made on an agricultural school, but the desire for an extension of the railway system must await the results of an expert inquiry, in view of the economic failure of the present system. In the meantime a private enterprise in motor traction is doing something to supply the want, whilst it is probably destroying the roads, and so entailing expenditure in another direction. No one with an elementary knowledge or memory of mythology or archæology can think of Cyprus without a hope that there may be recovered to this age some of the past glories of art and architecture which once made it their island home. The conflicting claims of the excavator, the local museums, the museums of Europe, and the private collector are difficult to reconcile, but steps have been taken, by the erection of an island museum and by expenditure on ancient buildings, to ensure that these priceless relics shall not be lightly dealt out to vandal hands.

In Cyprus—as elsewhere—there are politics, and, as elsewhere, they produce at times acute contention between the interests of divergent parties. Such an event has recently happened in the island: the Greek population have demanded a preponderance of representation in the Legislative Council over the Moslem population, which seemed likely to leave insufficient safeguards for the Turkish minority, and my inability to meet their views has led to what I hope may be only a temporary withdrawal of the Greek community from their legislative functions. A local disturbance, wholly unconnected with this political dispute, took place at the end of last month, which resulted in the regrettable necessity of the use of troops and of some augmentation of the small military garrison; but order has been happily and rapidly restored.

Having disposed of the Mediterranean, I can now start on my Empire tour, and, as a preliminary, I would like to mention the changes—and they are few—which have taken place in the six years under review in representative government and administration in the Crown Colonies and Protectorates.

Legislative Councils with unofficial, as well as official, members have been established in Nyasaland and the East Africa Protectorate. In Ceylon the constitution has been remodelled by the substitution of the principle of election for that of nomination, so far as was considered possible, for the Legislative Council, and the first meeting of the reformed council was held in January of this year. In the Malay Peninsula in 1909 Siam transferred to the British Crown her protectorate over Kedah, Perlis, Trengganu, and Kelantan, over an area of 15,000 square miles; and in the same year an important step was taken in the consolidation of the Federated Malay States by the creation of a Federal Council, consisting of the High Commissioner and the native rulers, with the Chief Secretary and British residents, and a number of unofficial members, to legislate for the whole Federation.

In the West Indies in 1909 there was a lowering of the franchise in British Guiana. In Basutoland a National Council was finally established by proclamation in 1910. But I must return on my tracks for a moment to the Nigerias, where by far the greatest change in administration is in process of gestation. Honourable members listening to me are doubtless well aware of the location of Nigeria; some of them may, however, have neglected the injunction of the late Lord Salisbury to study large maps; few probably are aware of the immense area of what appears as a comparatively small red patch in the Gulf of Guinea. The two Nigerias, however, represent a territory equal in size to the whole of France, Italy, and Switzerland combined, an area of 333,000 square miles, with a native population estimated at 16,000,000. It is true that a land stretching from the coast to Lake Chad on the north-east and towards Timbuctu on the north-west contains varieties of climate and diversities of population. From the mangrove swamps and the pagans of the south to the Mahommedans of the plateaux of Zaria and Kano there is a transition both of circumstances and of creed; but all who know that country best are agreed that there is an essential unity of their administrative future which demands both a method and a man. Happily the man is at hand with a tried and proved capacity to supply the method.

Though I have been convinced ever since I came to the Colonial Office that this amalgamation was desirable, I frankly admit that I should not have thought the moment opportune unless I had happened to know and been able to command the services of the one man marked out for this great work, Sir Frederick Lugard. I have been able, greatly to the regret of Hong Kong, to induce him to leave that post and to take up what will shortly become the Governorship of the combined Nigerias. Northern Nigeria is in the truest

sense the product of his foresight and genius. He reclaimed it from the unknown; he gave it a legal code, differing only in its civilisation from the essential lines of native custom; he established a land system which, combining altruism with revenue, may well be a model and an inspiration to other protectorates. Following on his footsteps, after his departure came closer administration, commerce, agriculture, and railway development. On my earnest solicitation he returns now to the field of his early and brilliant labours to complete and consolidate one of the greatest tropical provinces of the British Crown.

In my survey of our tropical progress I shall recur to several matters affecting the two Nigerias; but in the meantime I would make, and ask the Committee to make, this reservation. I am sending Sir Frederick Lugard out for the moment, and for a comparatively short tour, as the dual Governor of both provinces. I am sending him, so far as I am concerned, with a free hand to examine the situation as to its developments since his last visit; to plan and to organise the amalgamation, to examine the administrative, the financial, and the commercial possibilities, and then to return here and to discuss with me the probabilities of the future. There are many improvements and reforms in that district earnestly desired by members on both sides of this House. I would beg them to believe that though I may not discuss them to-night, and though I do not desire to anticipate decisions which, with Sir Frederick Lugard's assistance, will hereafter be taken, they are none the less present to my mind, and not by this brief delay less likely to be carried into effect.

Now let us turn to finance. I have already told the Committee what is the position as regards the Imperial Treasury, and the cost of, or contribution to, the Crown Colonies as compared with six years ago. Then we were paying out £1,200,000; to-day we are paying only £800,000. But, of course, with a lessened sacrifice here, there has been enhanced financial prosperity in the dependencies. In the Gambia, there is no debt; the invested surpluses have risen from £54,000 to £80,000, and the revenue (without increase of taxation) from £51,000 to £81,000.

In Sierra Leone the excess of assets over liabilities is close on £250,000, and (again without increased taxation) the revenue has risen from £281,000 to £458,000, with, I am happy to say, an increase of remunerative expenditure, but still showing a surplus of revenue over expenditure of £26,000.

On the Gold Coast the revenue has risen from £586,000 to £1,113,000, and though the expenditure has naturally increased it is still £205,000 less than the revenue.

Before we leave these three Colonies it may be worth while to glance at their trade as apart from their administrative finance. It may be well again to remind the Committee that all my comparisons are, so far as possible, of the years 1905 and 1911.

In the Gambia the imports have increased from £305,000 to £807,000, and the exports from £280,000 to £682,000, or an increase of total trade from £585,000 to £1,490,000; and, even after allowing for some abnormal movements of specie last year, the figures show more than a doubling of the trade. It is not unsatisfactory to note that imports of British cotton goods alone have risen from £47,000 to £105,000.

In Sierra Leone the total trade has risen from £1,260,000 to £2,380,000 or nearly double, and there again the import of cotton goods has risen from £205,000 to £316,000.

On the Gold Coast the total trade (evenly distributed between imports and exports) has risen from £3,100,000 to £7,400,000. Imports of cotton goods have increased from £360,000 to £680,000; of machinery from £86,000 to £243,000; of building materials from £22,000 to £56,000; wearing apparel from £51,000 to £105,000, and hardware from £38,000 to £98,000.

Passing to the Nigerias we come to an area of later settlement and great future possibilities.

In Southern Nigeria the revenue has increased by £867,000, and the expenditure by £661,000, and there is for the current year an estimated surplus of £120,000. The imports have risen from £2,800,000 to £5,200,000, and the exports from £2,900,000 to £5,300,000, or an increase of total trade from £5,700,000 to £10,500,000, and in both cases the figures are exclusive of coin and specie. The Committee should notice the close correspondence in the increases in exports and imports. The total trade, therefore, has nearly doubled, and in exports we find the value of cocoa more than six times what it was in 1906, and in imports the cotton goods have risen from £760,000 to £1,230,000 in value.

Northern Nigeria has up to now been, and still is, a subsidised Protectorate; but whereas in 1906 the grant-in-aid (without any provision for interest on railway loan) was £315,000, in this current year, after providing for such interest, the grant-in-aid asked for is only £156,000, or less than half; and with the amalgamation of the two Nigerias, of which I have already spoken, I hope that we may be able to set a short term to these grants-in-aid, and at the same time relieve the Treasury from its liabilities and the Protectorate from Treasury control.

Crossing Africa, somewhat south of this point, we come to Rhodesia, where the finances are a matter for the Chartered Company, but here, too, we find evidence of the almost unbroken prosperity of our tropical possessions.

In Southern Rhodesia the last year has shown large increases in both the trade and revenue returns, and the gold production has surpassed all previous records. In Southern Rhodesia for the last six years there has been a surplus of revenue over expenditure, and though this cannot be said of Northern Rhodesia, the prognostications of future prosperity seem wholly

favourable, subject to a scarcity of labour on which I shall have something to say later.

We have also a direct responsibility for the native Protectorates of Basutoland, Swaziland, and Bechuanaland, under the High Commissioner. In Basutoland the revenue has risen from £98,000 to £145,000, and the territory had last year a balance in hand of £136,000. Swaziland is only now emerging from a period of administrative confusion and of difficulties created by the profuse concessions of the Chief Mbandini. There is debt still to be paid off there, but the revenue shows a surplus over normal expenditure, and the country is approaching a position of financial stability. Bechuanaland is not yet self-supporting, but the annual deficit, which six years ago was £45,000, is now only £12,000, and the reserve balances in hand enable the Protectorate this year to forgo any grant-in-aid, though it is likely enough that one will be required in 1913-14. The population of the five largest native tribes has increased in the last seven years from 64,000 to 81,000, and during the same period the number of head of cattle has grown from 139,000 to 324,000—a good test of present prosperity and future revenue.

Diverging for a moment into the Indian Ocean, if we touch at Mauritius we find an island which has suffered much in past years from climatic vagaries and bad crops, but it is satisfactory to find that comparing 1906 with 1911 the revenue has increased by Rs. 800,000, and the expenditure decreased by Rs. 600,000 (the rupee being valued at 1s. 4d.). A Royal Commission has recently reported on the administration of the island and the necessity for economy, and most of their recommendations have been, or are being, carried out. I shall deal with what is almost its sole export—sugar—when I come to the head of agricultural products of the Colonies.

Returning to the East Coast of Africa, we come first to Nyasaland, always hitherto a Treasury-aided Protectorate, but now in its turn rapidly emancipating itself from the shackles of our philanthropy. Its revenue has risen from £82,000 to £114,000, and our grant-in-aid has correspondingly decreased from £37,000 to £5,000. Nyasaland has recently undertaken a further liability for interest and sinking fund, on a loan I have obtained for her from Imperial funds, for the redemption of subsidy lands in connection with a new railway, of which I will speak presently; but I have no doubt that these liabilities will be more than liquidated by the prosperity produced by her new and improved access to the sea. A land tax of a halfpenny per acre has recently been imposed, and additional revenue of £8,000 per annum is expected from this source.

Passing northward by the chain of the great lakes, we come to the contiguous, but widely diverse, territories of Uganda and the East Africa Protectorate.

In Uganda the revenue has risen from £97,000 to £232,000 and the grant-in-aid has fallen from £112,000 to £45,000. The Customs receipts have increased in the same period from £13,000 to £39,000.

In the East Africa Protectorate the revenue has grown from £460,000 to £780,000, and the grant-in-aid has been steadily diminishing. It has fallen from £164,000 to what is practically *nil* this year, though members will find in the estimates a sum of £23,300 under this head, which is, in fact, a provision by the British Treasury of part of the sum they have undertaken to supply for the development of the Uganda Railway to meet the traffic on the branch line to the great Soda Lake at Magadi, and it should be noted that this sum is in no way due to the ordinary requirements of the Protectorate.

We have arrived, therefore, at a point when we may hope with ordinary good fortune, and in the absence of unforeseen disaster, that this Protectorate, like others of which I have spoken, will shortly become self-supporting.

Crossing now the Indian Ocean to Ceylon we come again upon a scene of great and increasing prosperity. Her revenue has risen from Rs. 35,000,000 to Rs. 44,000,000, her imports from Rs. 113,000,000 to Rs. 156,000,000, and her exports from Rs. 110,000,000 to Rs. 172,000,000. During this process and period the shipping frequenting the island ports has risen from 13½ to over 15 millions of tons, nearly two-thirds of the whole being British.

In the Straits Settlement the revenue has risen from \$9,600,000 to \$10,600,000, and the total trade (exports and imports) from \$650,000,000 to \$738,000,000. The shipping has increased in tonnage from 19,700,000 to 23,500,000, of which over 14,000,000 tons are British.

In the four Federated Malay States the revenue has increased from \$27,000,000 to \$32,000,000, the imports from \$51,000,000 to \$53,200,000, and the exports from \$81,000,000 to nearly \$103,000,000.

In Hong Kong the revenue has remained stationary, and has only been maintained by the imposition of Customs duties on imported liquor in order to replace the revenue lost (and in my opinion rightly lost) owing to the closing of the opium divans, in accordance with the policy of His Majesty's Government. Owing to the absence of all other Customs dues, the statistics of inward and outward trade in Hong Kong are very deficient. Its advance, which is undoubted, can best, indeed can only, be estimated by the increase of shipping. The total tonnage of shipping entered and cleared has risen from 32¾ millions to 36½ millions, and of the shipping engaged in foreign trade 58 per cent. was British.

In order to complete my financial survey, I must now conduct the Committee across the Pacific and Panama to our Caribbean possessions.

The finance of nearly all the West Indian Colonies has shown a marked improvement in the last six years, and the majority of them are now in possession of considerable accumulated balances. I do not propose to weary the Committee with the statistical details of all the islands of this extensive and numerous group.

The rapid recovery of Jamaica from the financial and other effects of the earthquake of 1907 is most remarkable, and the trade of the island has shown such vitality that, in spite of heavy capital expenses, her surplus at the

end of this financial year is expected to exceed £200,000, and substantial reductions of taxation are being made.

The Leewards have made considerable financial progress, and have accumulated balances of £50,000; and in Trinidad it is the rapidity of development of reproductive works which alone creates a temporary stringency in her finances.

British Honduras is sufficiently prosperous to cope with an extensive programme of public works, largely paid for out of revenue; and the financial progress of British Guiana up to the end of 1911 has only, I hope, been momentarily checked by the unfortunate and prolonged drought of this spring, which has now happily broken.

There of course remains for future discussion and consideration the suggested reciprocity arrangement between Canada and some of the West Indian Islands, but I am precluded from dealing with that matter to-day, by the expressed wish of the Dominion and of the West Indies that the terms of the proposed agreement shall not be published here before they are discussed there. I may, however, remind the Committee that the whole matter, so far as it concerns the West Indies, is subject to the final concurrence of myself as Secretary of State.

I have now completed my Crown Colony budget, and I dare say honourable members will be relieved to pass to other topics of lighter interest, if not (for they cannot be) of greater importance, and I shall try to illustrate a few of the other avenues of progress which are leading those for whose well-being we are responsible to a condition of greater freedom and prosperity.

I suppose it is the frailty of human vanity which makes one sometimes wonder for what (if for anything) he will be remembered in his work and his department. If it were my good fortune to leave any indentation on the record of colonial life I would wish that it should be in the progress and development of railways and of tropical medicine. Each is, to a certain extent, the complement and the handmaiden of the other; either singly or a combination of both makes irresistibly for the spread of commerce by transport, and of civilisation by the possibility of white residence.

Let us look, then, first at the recent extension of railways in the Crown Colonies and Protectorates. In Sierra Leone—a small Colony—25 miles have been added in the last six years; 52 miles are now under construction, and a further extension of 20 miles has recently been approved, but even on the existing system of 253 miles the net receipts have risen from £5,000 to £27,000. On the Gold Coast 20 miles have been added, and another 36 miles are under construction and almost completed, and on the present working mileage the net receipts have increased from £50,000 to £188,000. The interest on the capital expended is over 9 per cent., and I now have under consideration the question of sharing some of this profit with the customers by a reduction in the rates.

In Southern Nigeria the mileage has grown from 131 to 307, and the net receipts from £24,000 to £131,000.

Here also great harbour works are in progress at Lagos, comprising the construction of two stone moles, each of $1\frac{1}{2}$ miles in length. Dredging operations are being conducted on a large scale, and, though the works cannot be completed for some years, already a steamer of 4,000 tons has crossed the bar in safety, though there are shifting conditions for which allowance must be made.

But the most important recent construction in West Africa has been the Baro-Kano Railway in Northern Nigeria, which has been laid and completed for 355 miles in little over three years. I believe it holds the record for track-laying in this class of railway, $6\frac{1}{2}$ miles having been laid in one day. The money was found for this work by a loan from Southern to Northern Nigeria, and the interest and sinking fund remain as a charge upon the Northern Province. Then within the last twelve months a branch feeder line has been constructed from Zaria, on the Baro-Kano Line, to the tin-fields of Bauchi. This for purposes of economy has been laid of a narrower gauge, and instead of following the most direct route it has taken a more northward one, in order to traverse a populous and cotton-growing district.

When in March of last year I took a supplementary estimate for this line it was for 100 miles, at a total cost of £200,000. Some doubt was expressed of the wisdom of narrow gauge, and I was asked at least to make the culverts and bridges sufficient for a wider gauge in the future. I promised to see what I could do, and this has been done. I also said that I hoped that the line would be finished and open in twelve months, and this has been done to the extent of 90 miles, which is probably all that need be constructed at present. When I estimated the cost of £2,000 per mile the right honourable gentleman the Member for St. George's, Hanover Square, was contemptuous of my knowledge or my optimism; he asked for further assurances as to cost; he said that no one who had experience of these matters would believe that it could be done at the price, and that to talk of such an amount was really ridiculous.

I was then only able, in answer, to express a confident belief. I am to-day able to confront him with the facts, which are that the 90 miles—including the wider culverts and bridges—have been constructed for £180,000, or precisely £2,000 a mile; that the railway was built within the year, and is now open and earning profits. £2,300 were taken in the first six weeks, and I should like, in passing, to pay a tribute to the splendid achievements of Mr. Eaglesome and his staff, who were responsible for the work.

I do not regard this railway as having reached its final destination; I hope some day it may be possible to project it another 50 miles, so as to bring it on to the Bauchi Plateau, which I regard in the future as a potential sanatorium for all West Africa.

In the six years under review the total mileage of railways open in the two Nigerias has grown from 150 to 900, and we are, I trust, nowhere near the end of that story.

In Nyasaland, also, there is a new chapter opening in railway construction, which will be of the utmost value to the rapidly growing agricultural development of the Protectorate. As honourable members are aware, there is now only a short piece of line from the headquarters of Government at Blantyre down to Port Herald on the Shiré River. The Shiré River has a very shallow bed and a very variable stream. The water portage of goods down this river to the Zambesi and so to the sea has therefore been very uncertain and unsatisfactory, often at its worst when most required for the transport of the harvest of various commodities.

It was really heartbreaking to hear of sacks of maize, of bales of cotton and tobacco actually rotting on the wharves, because they could not be got to the coast. I therefore, last winter, entered on some complicated negotiations, now happily completed, but of which I need not give the details, by which the Imperial Government have made a loan of £180,000 to the Protectorate to re-purchase the subsidy lands originally granted to the Shiré Highlands Railway, and at the same time the Protectorate Government are giving a guarantee of interest at 4 per cent. on £500,000 to the existing railway for its extension.

The railway, instead of stopping, as now, at the almost unnavigable Shiré River, will be taken direct to the Zambesi, and south of the Zambesi again by another company down to the port of Beira. It is contemplated that the Zambesi will ultimately be bridged to join the two lines, and I have hopes that this work may be taken in hand before the completion of the railway; but even if left to the future it is not essential to the great and immediate benefits which will be conferred by this new construction on the agricultural prosperity of Nyasaland. I hope also, in the not distant future, that the railway system will be extended northwards up to the south end of Lake Nyassa itself, so opening up a rich country full of much future promise.

In Uganda, which only contains the terminus of the railway which bears its name, there have been other and useful developments of communication. In 1910 the Treasury made a loan to the Protectorate of £180,000 for a railway from Jinja, a port on Lake Victoria served by the Uganda steamers, to Kakindu on the Victoria Nile, south of Lake Kioga. The original estimate was for 51 miles; it was found desirable to construct seven additional miles to Namasagali, but it will be a comfort to the right honourable gentleman to know that the ultimate cost for the whole was £170,000, or £10,000 less than the estimate for the original and shorter distance.

Additional steamers and a tug have been ordered for Lake Victoria, and four of the existing steamers are being adapted to oil fuel. Two

sternwheel steamers, six lighters, and four dredgers have been ordered for Lake Kioga—some of which are already on their way—and I hope shortly to be able to deal more effectively with the very remarkable and promising production of serviceable cotton in the Uganda Protectorate.

The Uganda Railway, which traverses and is almost wholly situated in the East Africa Protectorate, makes a steady and satisfactory progress. The profit on its working (not its capital cost), which six years ago was £56,000, is to-day £134,000, and I am now engaged in providing it with at least two new feeders. One is the branch line 93 miles long to the Magadi Soda Lake (made out of private capital, but necessitating a Government expenditure of £350,000 on the main line), and the Thika, or Fort Hall, Light Railway of 30 miles, traversing a very rich country northwards of the Uganda Railway towards Mount Kenia. The earthworks are in progress, and most of the material for the line has already arrived in the country.

This line is being made at a cost of £60,000, as a part of the loan of £250,000 I secured under the Finance Act of last year out of the realised surplus of 1910-11. The remainder of that sum is being devoted, as to £90,000, to a much required water supply for Mombasa, and £100,000 to a deep-water pier at Kilindini, the ocean terminus of the railway, by which we shall avoid the lighterage of all goods inwards and outwards from that port.

In addition to all this there is the new loan of £500,000, announced a few days ago by the Chancellor of the Exchequer, which comes out of the realised surplus of last year. It will be devoted to the general improvement of the Uganda Railway and its connections and extensions, both on land and on the lakes, and for the improvement of the wharfs and piers at the lakes and on the sea.

In Ceylon the actual working additions to the railway system in the last six years have been small, but within the last few weeks an extension of 27 miles of the Kelani Valley Line to Ratuapura has been opened, and a number of important extensions are being undertaken which will add about 130 miles to the existing lines.

One of the most valuable is the line of 65 miles to Manaar, by which it is hoped that connection with India will be made next year. Work is in progress on an extension of 27 miles from Negombo to Chilaw, and surveys are being made for extensions of 21 miles from Bandarawela to Badulla, and 17 miles from Ratuapura to Pelmadulla.

Here, also, at Colombo, was laid last month the last stone of the great harbour works which have been in progress for many years and which, besides an enclosed harbour of a square mile in extent, include a graving dock, a patent slip, and a coal depôt.

In the Straits Settlements, also, great harbour works are in process of construction at Singapore, including breakwaters and land reclamation, and a

large graving dock capable of taking in a Dreadnought, if one should ever find itself there.

The Federated Malay States, by their great prosperity, have been able to increase their railway mileage from 428 to 538 and to provide for this purpose more than \$51,000,000 out of revenue alone. A line of 120 miles has also been constructed through the State of Johore, which completes the through connection from Penang to Singapore, and extensions are being made to the Kelantan border with a view to an eventual linking up with the Siamese railway system. There are many other extensions either in progress or projected, by which, on completion, we may expect to place both Penang and Singapore in direct rail communication with Bangkok.

Even the diminutive Colony of Hong Kong has joined in the railway fever, and by a line of 22 miles from Kowloon has established a through route to Canton for the benefit of her great entrepôt trade.

In the West Indies there have also been activities in the same direction. I do not intend to specify them all, though there is opposite at least one honourable member who would not object if I did so, but to whose "extensive and peculiar knowledge" (like that of Sam Weller) I could probably add nothing. In British Honduras the Stann Creek Railway has enabled fertile internal banana lands to be brought under cultivation. In Jamaica an extension from May Pen to Chapelton, at a cost of close on £100,000, will serve a well-settled and fertile district, and the fact that the island, within so short a time of the earthquake disaster, is able financially to face such expenditure is an encouraging indication of its general prosperity. In Trinidad two connections have been commenced, which between them will serve districts of 24,000 acres and 20,000 population. And, lastly, in British Guiana funds have been locally provided for the survey of a railway which may, I hope, eventually extend into the interior, which offers scope for future schemes of great size and utility. The new Governor, Sir Walter Egerton, will carry with him there his knowledge and experience of the transformation effected by such activities in Southern Nigeria.

Now, I have done with railways, and I must pursue my remorseless threat of taking the Committee to the subject of medicine.

Our Crown Colonies enjoy or suffer not only all the ordinary diseases of the temperate zones, but they add for themselves most of, if not all, the pestilences of the tropics.

With the modern advance of medical science, we are happily able to look to and depend more on prophylaxis than on cure. When American care and genius have turned Panama into a health resort, there need be no limit to our hopes for the future. The discovery of the mosquito as the carrier of malaria, the study of its life-history and the methods of its destruction, have put a new engine of hygienic progress in the hands of our medical staff.

The recent realisation that the *stegomyia* of yellow fever finds its favourite

birthplace in the rejected and rain-filled jam-pot has enabled elementary sanitation to greatly diminish this fell disease.

In Ceylon ankylostomiasis (called here the Cornish Tin Miners' disease) is being treated by prophylactic methods, and more than one West Indian Government is dealing or preparing to deal with the same disease.

Throughout most of our tropical possessions the natives are being dealt with, where and when possible, for the all-pervading and decimating disease of syphilis, both by the old mercurial and by the newer and more successful Salvarsan treatment. This drug—till recently known as 606, from the number of experiments by which it was procured—has occasionally and locally fallen into disrepute owing to some toxic mishaps arising from its arsenical origin, but on the whole its curative effects have been both rapid and permanent. It is not, however, a drug which can be easily exhibited to large numbers of ignorant natives; its full effect can only be obtained by intravenous injection, a more elaborate and delicate process than that of subcutaneous injection, and in any case it is found difficult, without compulsory powers, which do not exist, to retain the native for full and final treatment after the painful symptoms have subsided, but before the cure is complete. I must, however, in relation to Salvarsan, mention the extraordinary results obtained with it in Ceylon and Trinidad in the treatment of a disease known as yaws (or *frambæsia*) from the character of its pustular rash. The experimental use of Salvarsan was suggested by the similarity of some of the symptoms to those of syphilis, though the origin and character of the disease are wholly different. We owe the discovery of its effects on yaws to Dr. Strong, of the United States service in the Philippines, and independently to Professor Castellani, of Ceylon. The credit of the definitive results is due to Dr. Rost, of the German Navy, and Drs. Cleaver and Alston, of Trinidad.

In the Yaws Hospital in Trinidad during last year 500 patients were treated with Salvarsan for this complaint, and the cures amounted to close on 100 per cent., so that at last we are able to regard this distressing malady as a curable and preventable disease.

In British Guiana experiments on leprosy with nastin and benzoyl chloride, which at one time gave much hope of success, have, unfortunately, belied their early promise.

But in the Federated Malay States the Research Institute at Kuala Lumpur has attained the almost certain diagnosis of the cause of beri-beri. This disease seems to be the product of the consumption by an exclusively rice-eating population of a highly polished commercial rice, from which in the process of polishing the phosphorus pent-oxide has been removed with the pericarp. I hardly venture in the presence of some of my ultra-humanitarian friends to mention an interesting and conclusive experiment by which you can practically kill a fowl by the prolonged administration of polished rice and revive it with a meal of the missing husk.

Just now I referred to malaria, and I should like in passing to mention the steps which are being taken in the West Indies to deal with this disease. Those of us who have suffered it (and I am one) are sadly conscious of the weary soaking in quinine till deafness supervenes, and the occasional alternative of arsenic with cumulative discomforts—insufficiently compensated by an improved complexion. In Jamaica and British Guiana anti-malarial measures have been vigorously and on the whole successfully applied. Swamps have been filled; mosquito-infested bush has been cut down; quinine has been imported by the Government and sold at cost price on sugar estates and at the post offices, and on many estates distributed free to labourers. Open drains have been cleaned and stocked with fish to eat the larvæ. The empty sardine tins and the broken bottle have been buried or removed; water receptacles have been compulsorily screened from infection, and popular lectures both on mosquitoes and the preventive use of quinine have been delivered by medical officers and others. The results have repaid the labour.

In British Guiana the recorded cases of malarial treatment were in 1907, 34,000; in 1911 they were 21,000—a reduction of 38 per cent., which appears to be entirely due to the anti-malarial measures which have been taken.

But undoubtedly the most anxious problem of the present and the future in tropical medicine is that of sleeping sickness. For many years an obscure and, happily, not common disease, it has become either more patent or more diffused with the spread of commerce and civilisation, bringing, as both of them do, a new and unaccustomed mobility to the native populations. For some years it has been known that this disease was endemic in certain lakeside districts which were the sole and particular haunt of that species of tsetse fly known as *Glossina palpalis*. The habitat was fortunately not widely diffused, and was dependent upon the contiguity of more or less stagnant water. Drastic costly and successful methods were adopted for its eradication; the scrub and bush surrounding the Central and East African lakes were cut down or burnt. Not only villages, but whole tribes, were removed from the area of infection. The sufferers were segregated, and, if not cured (for that is as yet a rare and wonderful event), were at least prevented from becoming carriers to their fellows or to the fly. All seemed going well with a hopeful promise of ultimate eradication, when Nature, as if irate at human control, dashed our hopes through the scientific discovery that *Glossina morsitans*, the most common and most pervasive of tsetse flies, was also a carrier of the infection, and many animals, both wild and domestic, have fallen under the almost proved suspicion of being life hosts of the deadly trypanosome. The realisation of this horrible development has given rise to a too previous demand that all the suspect species of mammals should be ruthlessly destroyed. But the time is not yet, for the proof is not sure. Let me at once protest that my hesitation is not in the interest of so-called

big game—indeed it is quite likely that the infection is equally conveyed by small vermin.

It is true that as a naturalist I should be very loth to exterminate a species which can never be restored. Within the memory of living man the great auk has ceased to exist, and, still more remarkable, within a decade the passenger pigeon, which used to cover the United States with a migratory cloud, has been wiped out so completely that only one caged and living specimen is believed to exist to-day. But at the same time I would hesitate at no destruction of wild fauna if, and when, I was convinced that this holocaust was essential to the elimination of disease.

In order to be sure of the facts and to secure scientific guidance for future action, however drastic, I have sent to Nyasaland a Commission of highly trained and distinguished men under the direction and personal supervision of Sir David Bruce. I am receiving from them frequent reports. I am watching the almost daily development of their diagnoses, and I shall shrink from no action which may seem to be dictated by the data of ascertained facts. The Commission which the British South Africa Company has sent to Rhodesia is obtaining valuable results, which will materially assist the work of the Commission in Nyasaland.

But many of the empiric cures suggested by those who are not on the spot appear, on consideration, to be as bad as the disease. To talk of the extermination of the wild fauna of a sub-continent is to talk wild nonsense. The suggestion is only possible from those who take their natural history and their geography from a school atlas. To give the natives power, permission, and material with which to drive back the game from the neighbourhood of their villages is both possible and desirable, but it carries with it in its train certain dangers. The game, if infected (and that is the only reason for their removal), will then carry with them the trypanosome to some now immune area, and, if the natural incubator is removed, the fly will be more inclined, and compelled, to attack both man and his domestic animals. The Acting Principal Medical Officer of Nyasaland in his report of last year said: "The fly has adapted itself to new conditions, and has learned to make use of man as its ordinary food where game used to supply its needs"; and as a corollary he asks: "Why this enormous increase in the numbers of fly in districts where game was plentiful but does not now exist?" It is begging the question to say that when game goes, *morsitans* goes; that is the specific inquiry upon which the Commission is engaged.

In my present belief, civilisation will best destroy *morsitans*, not by the removal of the wild game, but by the cultivation of the soil. Many additional precautions can be and are being taken, pending the results of these inquiries. Some native villages are being moved, others are being amalgamated, because flies are more easily kept down in the *ceinture* of a large settlement. Fly-trapping also may usefully be adopted, as its success has been proved in

German East Africa, but I would beg the Committee for the moment to believe with me that heroic measures founded on half-knowledge are a mischievous form of human folly. With the establishment of civilisation and administration, inter-tribal communication increases beyond its ancient wont, and the risk of spreading sleeping sickness is enlarged; so in the tropics at least the institution of law and order is not always a blessing in disguise.

West Africa has enjoyed throughout its history an evil reputation in matters of health, but I have recently been able to lay before the House a return based upon statistics for the last nine years, showing a most marked improvement in the hygienic conditions of that coast. In spite of outbreaks of plague, yellow fever, and other pestilences, the death-rate of European officials in those nine years has fallen from 21 to 13 per 1,000, and the invaliding rate from 56 to 25 per 1,000. This gratifying improvement is progressive, and is doubtless due both to sanitary care and a more careful mode of life by those whose duties compel them to reside there.

I cannot leave this matter without at least a few words on the subject of the study and pursuit of tropical medicine in this country. We owe a deep debt to the interest in this science of the right honourable gentleman the Member for West Birmingham. It was largely due to his encouragement and activity that the Liverpool and London Schools of Tropical Medicine have reached their present status and efficiency. These schools render invaluable services to our Colonies, by the supply of competent and carefully trained students as recruits to our medical staff, of men who have had the opportunity of instruction in the specific diseases of the tropics, with which they will have to deal; and these schools also undertake a large amount of scientific research in tropical medicine from the results of which we constantly profit.

But the London School is much in want of further funds to extend its beneficent operations. I am glad to say we have recently secured a bequest by Lord Wandsworth of £10,000 for medical research, which has been allocated by Sir William Bennett to the provision of scholarships at the London School, but much more is needed, and I warmly commend this institution to the generosity of the public. During the last few years large sums have been spent in Uganda and Nyasaland in the investigation of tropical diseases there, and contributions have been made from colonial funds to research work in connection with Malta fever, liver abscess in Fiji, vomiting-sickness in Jamaica, pellagra in the West Indies, and many other cognate matters. Permanent research laboratories have been established in the Federated Malay States, Ceylon, British Guiana, the Leeward Islands, and in Southern Nigeria.

In the Colonial Office itself, during the period of which I am speaking, much progress has been made towards a better knowledge and supervision of these subjects. I have now a permanent Committee to advise me on medical and sanitary matters connected with Tropical Africa, containing

such distinguished men as Sir Patrick Manson, Sir Ronald Ross, Sir James Fowler, Dr. Thomson of the Local Government Board, and Professor Simpson.

There is also a Committee of Entomological Research, which was at first limited to Tropical Africa, but I am now making arrangements by which the self-governing Dominions, India and the Crown Colonies generally can avail themselves of its services. And last, but not least, there is the Sleeping Sickness Bureau, which I am about to expand into a bureau dealing with tropical diseases generally, whether of men or of animals.

In relation to tropical medicine it is impossible not to record the great loss sustained in the recent death of Sir Rubert Boyce, who rendered great services to the West Indies and to West Africa, or to the impending loss we are to suffer in the retirement of Sir Patrick Manson, who has for many years been the guide, philosopher, and friend of the Colonial Office and the Colonial Service.

I make no apology for having detained the Committee at this length on the important subject of medicine, even at the cost of some compression of other matters which I am still anxious to touch upon.

I will now say a few words on the natural products—both vegetable and mineral—of some of the Crown Colonies.

The Gambia has practically only one export, ground nuts, and the value of this has risen from £170,000 to £388,000. In Sierra Leone the value of the export of palm kernels and oil has increased from £288,000 to £708,000, of kola from £76,000 to £192,000, and ginger from £8,000 to £33,000. With a view to further development of this valuable trade the Agricultural Department has been strengthened. A Forestry Department has recently been formed, and I am considering legislation for the better utilisation and conservation of the forests.

On the Gold Coast there has been a boom in the production of cocoa, an industry which is entirely in the hands of the natives. The export has risen in quantity from 11,000,000 lbs. weight to 89,000,000 lbs. weight, and in value from £187,000 (sterling) to £1,613,000. Palm oil and kernels have risen in value from £167,000 to £346,000, and timber from £85,000 to £148,000. The greater profit on these commodities has prevented any development of cotton-growing in this Colony. Here again the enlargement of the Agricultural and Forestry Departments has contributed greatly to the advance of these industries.

In Southern Nigeria a new Agricultural Department has been formed, and, by the agency of the Forestry Department, a most remarkable development of the growth of rubber has been produced. The Government supply the seed and the instruction, but the plantations are entirely in the hands of natives. In the Benin district alone there are seventy native "communal plantations" with over 1,500,000 young trees, some of which have reached a "tappable" size. About 200,000 new plants are being added annually, and

when they reach maturity there will be an immense addition to the prosperity of the Province.

In Northern Nigeria the prospects of cotton are very promising. The British Cotton-growing Association has opened a ginnery at Zaria, on the Baro-Kano Railway, and whereas last year their purchases only amounted to 500 bales, they have this season already reached 1,600 bales, and a cautious observer on the spot confidently expects that the crop will very soon amount to 10,000 bales. It must be remembered, however, that there is much native competition in the purchase of good cotton for the local production of the fine Hausa cloth, which is so lasting that it passes in families as an heirloom, and proves sometimes a serious rival to the products of Lancashire. This is not the last time I shall have to mention the British Cotton-growing Association, but I will take this opportunity to say how great has been the value already to the Colonies, and, I believe, in the future to Lancashire, of the work of this Association, which is fully justifying the assistance which it receives from the British Treasury and the support accorded to it by our great cotton industry.

In passing down the coast, I must say a word of the benevolent and successful work done in St. Helena to relieve the prevalent distress by the establishment of a lace school. Under the admirable management of Miss Girdwood over 4,000 yards of lace were produced last year and over £500 was paid in wages to the workers. I would venture to suggest to honourable members that they should encourage their lady relatives to extravagance in so laudable a cause. A flax mill is also running with plenty of raw material, and paying its way.

Nyasaland, as I have already said when dealing with the railway, is showing very rapid commercial progress. The principal exports are tobacco, cotton, and rubber. Tobacco export has increased in weight from 400,000 lbs. to 1,700,000 lbs.; cotton from 500,000 lbs. weight to 1,700,000 lbs.; rubber from 18,000 lbs. to 63,000 lbs. The British Cotton-growing Association have already opened two ginneries, one in the north and the other in the south of the Protectorate, and they are about to erect a third at Chiromo. The export of tea may also largely increase in the future, for the acreage planted with it has almost doubled in the last two years, but the trees require several years to arrive at the stage of production. There is a considerable export of maize, which is likely to increase on the completion of the railway, unless a portion of it is ultimately used locally for the production of a commercial alcohol. If suitable motor engines could be devised for the use of crude alcohol a great impetus would be given to agriculture here, where the price of petrol is prohibitive. Sisal is proving a useful crop on land which is unsuited to more valuable products, and the Agricultural Department has taken a very necessary step in the discovery of suitable leguminous crops, which, when ploughed into the cotton and tobacco lands, restore by their nodules the nitrogenous elements which have been exhausted.

In Uganda there have been great developments of rubber and cotton. The export of rubber, which has risen from £9,000 to £22,000, was exclusively wild rubber. The plantations are only just coming into bearing and are likely to swell the figures greatly in the near future. For the cotton industry special expenditure has been sanctioned, and a special staff engaged to promote its growth on sound lines. The export has risen in three years from 17,000 cwts. to 83,000 cwts. But the most important question at this moment is the acquisition of the best type of cotton. Honourable members may know that you may take the seed of the best Sea Island or Upland or Egyptian cotton to Africa, but when it comes up it produces a wholly different type; even if it is a good one the seed which it produces may be of inferior quality, and the subsequent crops degenerate to a coarse or short staple; so that experience has shown that each Colony has to create and to fix the best type which its soil and climate can produce. Great activity is being shown in the planting of coffee, which seems well suited to Uganda. There was a small export of 270 cwts. last year, but I should not be surprised if, in the next five years, this industry rivalled that of cotton.

In the East Africa Protectorate a wise policy has been adopted of large expenditure on skilled agricultural advice to develop the industries, both of the settlers and the natives. The agriculture of the Protectorate varies greatly as between the highlands and the tropic areas of the coast belt and the Lake Nyanza basin. In the highlands a trade in maize and beans is being encouraged by special railway rates. The value of the export of maize has risen from *nil* to £7,000, and of beans from £300 to £5,700. Wheat is still a difficulty owing to the necessity of procuring or creating truly rust-resisting variety. The production of wattle bark, used largely for tanning, is rapidly increasing; 2,000 acres have already been planted, and much more land is being prepared for it. With an export of raw ox-hides, which has risen from £9,000 to £41,000 in value, I do not despair of seeing local tanneries established for the treatment of these products. Sheep have largely developed in the highlands; a great improvement has been effected by the up-grading of native sheep crossed with merino, and this is shown by a rise in the value of wool exports from £800 to £5,000. Pigs are doing well, and there is some hope of an export trade, even without any Imperial preference, on maize or bacon. Ostrich farming is a new industry, and exported feathers last year to a value of £1,300, but is suffering from the depredations of the larger vermin, if it is permissible to apply such a term to lions. In the tropical districts copra and rubber are largely increasing, especially the latter, which has an export of £21,000 in value, as against £2,000 only in 1908; and *sim-sim*, an oil-seed of the Sesame species, has created a new trade export of £20,000. Cotton, the exports of which are now £7,000 as against £500, will probably be largely developed in the future on the Juba and Tana rivers.

In Mauritius, sugar and its products account for something like 96 per cent. of the exports, and were of a value in 1910 of £2,350,000. Of this

amount nearly £1,600,000 went to India, and the remainder to other parts of the Empire, only a wretched £13,000 worth finding its way to all the other countries of the world.

In Ceylon the export of tea still progresses, though with somewhat sharp fluctuations. The value of the export has increased from Rs. 61,000,000 to Rs. 84,000,000; but rubber cultivation bids fair to displace tea. The area under rubber has doubled from 100,000 to 200,000 acres and the export has risen in value from 1 to 24 millions of rupees.

The Straits Settlements and Federated Malay States tell the same story of rubber. The area planted with it has grown from 125,000 acres to 350,000 acres and the export in the Federated Malay States alone has increased in quantity from 1 to 20 millions of lbs. weight.

In the West Indies the production and export of sugar have remained practically stationary, in spite of the results anticipated in some quarters from the Brussels Convention, but great progress has been made with other products such as fruit and cotton. An Imperial Department of Agriculture has been established, which receives over £5,000 per annum from Imperial funds, and we have recently determined to continue this contribution for another ten years.

From Trinidad the export of cocoa has doubled in four years, and now amounts to a value of £1,250,000, and the value of bananas exported from Jamaica alone has risen from £800,000 to £1,100,000.

On the mineral products I will only detain the Committee for a moment, though they are far from being unimportant.

The export of gold from the Gold Coast has doubled, being now over £1,000,000 per annum.

In Southern Nigeria there is good promise of the development both of coal and lignite, which latter requires briquetting to turn it into a serviceable fuel.

In Northern Nigeria tin is being worked in the Bauchi district and the cost of transport is being reduced by the new railway. It is no fault of the local administration if more tin is found in the prospectus than by the prospector, and I sometimes wish that the activities of Bauchi could rival those of the Stock Exchange.

From Nyasaland there is a considerable export of mica, and the East Africa Protectorate hopes much from the great soda deposits at Lake Magadi.

In the last three years there has been an important development of the oil industry in Trinidad. At the end of last year eleven companies were at work on the oilfields, and the production of crude oil has exceeded 16 millions of imperial gallons, and in the month of March nearly 1,000,000 gallons were produced. Recently two Ordinances have been passed—one to regulate the pipe lines and the other to secure the right of pre-emption of these products to the Imperial Government in case they may be required for the Navy.

I want now to say something about native labour in the tropics. The

basis of our policy is one which I shall always maintain, viz. that labour shall be fair and free for the employed, and, so far as possible, plentiful and profitable for the employer. It is, unfortunately, true that some tropical islands and Colonies cannot be developed without imported Indian labour, but we take the greatest care that this importation is always under conditions approved by the Indian Government, which is rightly a most rigorous protector of its own population. In Nyasaland there was in the past a considerable surplus of local labour which used to pass to farms and mines in Rhodesia and to mines in the Transvaal, but recently a shortage of labour has developed in that Protectorate, and is indicated both in the despatches of the Governor and the report of the British Cotton-growing Association. For the last year or more, recruiting of labour for other Colonies has been forbidden and the passage of natives out of Nyasaland has been discouraged. It has been found that the previous migration led to the dissolution of family and tribal ties, and often to the demoralisation of the emigrant; and the very high mortality of the Nyasa natives in the Transvaal mines has led to the total prohibition of their emigration for employment there.

In Mauritius the introduction of indentured labour from India has been abolished, as has also the so-called "double-cut," by which a labourer absent without leave for one day lost two days' pay.

In the Straits Settlements also indentured immigration from India has been abolished, and after June 1914, the present system of Chinese immigration for the purpose of entering upon indentures will come to an end.

In the West Indies for the last nine years British Guiana has set a good example by an arrangement under which the whole cost of the immigration of coolie labourers is put upon the employers. In some of the islands, however, a part of this expense has fallen till now upon the general community and taxpayer. I have been anxious to alter this, and I am glad to say that last year arrangements similar to those of British Guiana have been established in Jamaica; and at this moment the Governor and the Immigration Committee of Trinidad are working out a plan by which a like result will be attained.

I may add that repatriation of the coolies from all three Colonies is now provided at the expense of the individual employer.

There is another matter cognate to labour which was discussed I think on the Colonial Estimates last year: I mean the "House Rule" system of Southern Nigeria. I have examined the matter very carefully, and I am by no means satisfied with the existing situation. Whether it will be possible eventually to abolish this system altogether I cannot yet say, but I think it may certainly be confined to a more restricted area, and probably only to the coast strip where it originated, and where there are special reasons for its existence. I have asked Sir Frederick Lugard to report specially to me on this matter on his return from his tour of inspection, but, in the meantime,

there was one aspect of this system the reform of which I thought would brook no delay.

Till now a man who was once a member of a "House" was so for ever without power of release. I have given instructions that an Ordinance shall be immediately passed—indeed, it is, I believe, already law—by which any member of a "House" can purchase his discharge on easy terms, by instalments, whilst retaining the right to all his personal property. The whole transaction will be conducted through the British District Commissioner, who will fix the amount to be paid, and a provision is inserted that the amount, in the case of a member of the labouring class, shall never exceed £15.

Closely connected with tropical labour are the questions arising out of the sale and taxation or prohibition of liquor. I had looked forward with much hope to the discussions and decisions of the International Liquor Conference which met at Brussels last winter. Unfortunately, no agreement was reached and no report was signed. I was unwilling, however, to let matters rest there, and I considered what, failing international agreement, we could ourselves do to carry out the proposals we had supported, even though our neighbours are not yet prepared to go so far. With that object I have dealt immediately and drastically in the West African Colonies. I have given instructions that the importation of distilling apparatus for potable spirit shall be prohibited, and that all local distillation of such spirit shall be forbidden. The zone of prohibition in the Nigerias is to be extended over a new district of more than 3,000 square miles in Southern Nigeria.

The Gold Coast has already the highest West African rate of duty on imported spirits, viz. 5s. 6d. per gallon at a strength of 50° Centigrade. I have directed that the duties in Sierra Leone and Southern Nigeria shall be at once raised to this figure, in spite of the lower rates current in the neighbouring possessions of other countries, and I am now in communication, through the usual channels, with other European Powers as to the possibility of their taking action on similar lines.

In our Eastern Colonies duties are now for the first time imposed on imported liquors at Hong Kong; and in the Malay Peninsula the duties have been increased by some 35 per cent., and those which were formerly levied at so much per gallon are now graduated according to alcoholic strength—a direct and efficient encouragement to the consumption of less potent spirits.

In Ceylon a new Excise Bill has just been passed unanimously through all its stages by the Legislative Council. This Bill, on its first production, met with some criticism in Ceylon and with a good deal of agitation here. But from the moment that Bill was explained to the Council, in an extremely able speech by Sir Hugh Clifford, the opposition entirely disappeared in the Council, and all the unofficial as well as the official members supported it. I am not surprised that this should be the case when the real object and effect

of the measure is understood. It was submitted to and approved by me before it was introduced, and I convinced myself, after examining it from the standpoint of a temperance reformer, that it would attain that object. There has been in the past far too large an amount of illicit sale, which the Bill will undoubtedly check. There has been too wide a diffusion of small distilleries, which will now be greatly limited, and, in addition to the total suppression of the illicit taverns, there will be a reduction in the number of those which will be licensed—a reduction which may be carried further in the future in accordance with the needs of the localities.

In the matter of opium some advance has been made, though not—I am painfully aware—as great as is desired by some of my honourable friends. I do not think we differ as to the road or the goal, but only as to the pace. Since the Government of the Straits Settlements took over the monopoly on January 1, 1910, the price has been steadily and deliberately raised throughout the whole of the Peninsula under British administration in order to decrease consumption without too immediate and excessive loss of revenue. The price was \$3 per tahl when it was taken over; it was raised by successive steps to \$4.80, and as lately as last month to \$5.50.

In Hong Kong the number of chests allowed to the “farm” has been limited. The “farm” is let in triennial periods, and that which expired in March 1910 was entitled to 1,200 chests, but on its renewal this amount was cut down by 25 per cent. to 900 chests, and all opium divans have been absolutely prohibited. In Wei-hai-wei opium is totally prohibited except on medical certificate, and out of a population of 150,000 there are only forty licensed consumers, and the only importation of opium in the last three years was three chests in 1909.

In Ceylon no opium shops are permitted. Its use is limited to habitual consumers, who must be registered. They will in the course of nature die out, and have no successors; but they may not disappear so quickly as some would expect, for I remember that De Quincey's doctor said to my father, then a young man at Cambridge, that the effect of opium—or rather laudanum-drinking, which was De Quincey's vice—tended to prolong life, from the fact that it prevented wear and tear, just as your carriage would last longer if it never left the coach-house.

During last autumn and winter there was an International Congress at The Hague in connection with this traffic. The most important articles of the Convention, which was there happily signed, are those dealing with morphine, cocaine, and such drugs, and providing for an international control by the Powers over the manufacture, sale, and export of these poisons. We shall be prepared at the proper time to take legislative measures for this purpose in this country, and I have already sent despatches to the Dominions, and to such Colonies as are not automatically parties to the Convention, asking that I may be authorised to agree to it

on their behalf. There is, unfortunately, grave and undoubted evidence that the compulsory reduction of opium has led some people, and in some places, to the even more deadly vices of morphine and cocaine, and until by international action we can check this, it will be unwise to proceed further to the desired goal of the total cessation of the opium habit.

And, in conclusion, and I assure the Committee that this is really the last lastly, I must say something on land and concessions.

I am happily absolved from dealing at this moment with many of the controversial points which specially interest some of my friends on this side of the House, because I have recently received a deputation from them, and gathered much information and suggestion from the interview. Many honourable members have a special admiration (which I admit I share) for the land system initiated in Northern Nigeria by Sir Frederick Lugard, and it will, I am sure, be a comfort and encouragement to them to know that he will in future govern both the Nigerias. But however excellent a land system may be as applied to a new country not yet redeemed from barbarism, it is not always possible to apply it to other territories which have undergone the painful process of civilisation at an earlier period, and, rightly or wrongly, adopted and developed a land system on different lines.

I do not wish to argue that Land Reform is impossible in any country, however highly organised or conservative in its customs, but the pace must vary with the circumstances of the case, and the inertia or toleration of the people. On the Gold Coast and in Ashanti much confusion has been caused by the unsuccessful attempt to validate doubtful concessions by native chiefs. Some doubt arose as to whether the Concessions Ordinance of 1900 sufficiently protected the rights of the natives, and early this year I sent Mr. Belfield—an officer with much experience of land questions in the Federated Malay States—to report on the whole matter. He has just returned, but I have not yet received or considered his report.

In the matter of the land system of Northern Nigeria I need say nothing. A Committee sat on this question in 1908, and their report was laid before Parliament, and their recommendations ultimately embodied in a law of the Protectorate. My honourable friend the Member for Newcastle-under-Lyme was a member of that Committee, and had the rare experience of signing a report which was not only satisfactory to him, but to those to whom its recommendations were applied. I am now appointing a new Committee to consider how far some of the Northern Nigerian land principles can be applied (if at all) to other West Coast Colonies and Protectorates. It will consist of some of the officials of my Department, and will also have the assistance of the Member for Newcastle-under-Lyme and of Mr. Morel, who is so well acquainted with that coast.

In East Africa, though we are hampered by the obligation of some big concessions in the past, that policy has happily passed away, and it is now

impossible, except under special circumstances and with my express consent, that any grants above 5,000 acres should be made. On the coast strip of the East Africa Protectorate there has been, and still is, much confusion owing to the complexity of the land titles of native owners, but large sums are being spent in delimiting the coast land settlements, and I hope that, as a result, the Government of the Protectorate will find itself in possession of a considerable amount of land available for further development. When the Colonial Office took over the East Africa Protectorate from the Foreign Office in 1905, they found a land system which did not seem to be based on the most economic lines. Since that time the land law has been amended in a direction which I do not doubt will be to the advantage of the future inhabitants of whatever colour.

The system of freehold sales, except to a comparatively small amount, has been stopped. Land is now being leased for a term of ninety-nine years, with a revision of the rent at intervals of thirty-three and sixty-six years, but with limitations as to the amount of possible increase of rent, and of the basis on which it may be assessed. Further precautions may be necessary against "dummying" and the illicit accumulation of great acreages in few hands, and there is no inherent injustice in the theory that those who hereafter acquire new leases or concessions should contribute fully to the revenue of the Government which supplies them with law, order, and security.

And now, Mr. Whitley, I have done, not because I have exhausted my subject, but because I have exhausted my audience. If I attempted to tell them all I should like them to know, they would have "fled full soon," like Bon Jean St. André, and I should find myself still speaking to empty benches at the hour of our adjournment. But I realise that a Supply day is not intended for a Ministerial monologue.

In conclusion, I should like to pay here, as I have done elsewhere, my tribute of unfeigned admiration to the splendid work of the whole Colonial Service from the top to the bottom.

I am able to speak of them now both with knowledge and with gratitude.

They spend a great period of the best of their lives on very moderate emoluments in distant and often deadly lands—lost to their friends, removed from public appreciation in the obscurity of the jungle—but, if they err, never spared from blame. They reap few rewards, except the advantage of the native, the credit of the Service, and their own good name; but they have at least the testimony of the civilised world to their probity and humanity. The Empire owes more than it will ever pay to her exiled and strenuous sons.

I can only apologise to the Committee for the draft I have made on their indulgence, and thank them for the generosity with which they have met it.

To one who is addicted to administration, the daily work of the Colonial

Office ceases to be a labour and becomes an obsession ; it has a fascination which is all its own, and an absorption which is irresistible. The Colonial cobbler becomes addicted and attached to his last. I have to-night only tried to touch lightly some of the great problems which lie before us, and are even now being moulded in our hands. I cannot pretend to have made the sketch an entertaining one, but if, in its recorded shape, it proves to be a pemmican of progress, I shall have achieved all at which I ventured to aim.

FOREIGN LEGISLATION AND LABOUR DISPUTES.

[*Contributed by* NORMAN BENTWICH, ESQ.]

IN the eager search for precedents of legislation dealing with the settlement of labour disputes, which has recently been stimulated by the succession of great strikes in the country, attention has been mainly directed to the measures passed by the democracies in our oversea Dominions, which represent the most advanced step in State control of industry. But the labour unrest which is now causing consternation in England has for several decades existed on the Continent, and several European Powers have been compelled to pass special legislation for the peaceful settlement of collective disputes between employers and workmen which menace the industrial life of the State. And seeing that the social and economic conditions of Continental countries are in many ways closer to our own than those which pertain in the Dominions, a summary of some of the Continental systems of industrial conciliation may be instructive. Prof. Bauer, of Basel, gave a very instructive lecture on the subject at University College in June, and part of the material of this paper is derived from his remarks and part of it from the Memoranda published by the Labour Department of the Board of Trade relating to laws affecting strikes and lock-outs (1912, Cd. 6081). By way of premise it may be said that Continental countries generally have established special and permanent tribunals, which have jurisdiction over industrial disputes and questions; but from this common basis several of them have developed more elaborate machinery.

France.—The model of all Conciliation Boards is to be found in the French Conseils de Prud'hommes, which date back to the fifteenth century, when they were first established at Marseilles to settle disputes and divide profits in the fishing trade. In the great reform of French law which attended the French Revolution, Napoleon I. extended their sphere, and he directed their appointment in all the chief towns over the whole country. Regulations for the Boards were enacted by a Law of 1810, and have been amplified by subsequent legislation, which was finally consolidated in a law of March 1907. The new enactment extends their sphere to all categories of commerce and industry and enables them to be appointed whenever a Conseil municipal demands it, as well as when the parties to a labour dispute apply, and it further allows women to be

elected upon them. They are established by decrees given in the form of statutory rules and orders (*rèlements d'administration*), and are composed of an equal number of masters and employees (usually three of each) chosen out of one trade or out of a number of kindred trades. The members are elected for a period of six years, half of the Board retiring every third year. They must have been connected with the trade or industry for at least three years, and must be twenty-five years of age. They meet at least once a week. Their function is to determine any disputes which arise upon any existing contract in relation to the trade, and their procedure is quasi-judicial; they rank, in fact, as part of the judicial machinery of the State. Each *Conseil de Prud'hommes* comprises two bureaux or departments, the conciliation department proper and the general or judgment department, which deals with matters that have not been settled by conciliation. Every dispute must first come before the conciliation bureau, and the parties, who may appear voluntarily or on a citation, must attend before it in person, though they may have the assistance of an advocate. If the preliminary attempt at a settlement fails, the matter comes before the general department, which gives a decision. An absolute majority of the members present must concur, and in the event of differences there is a fresh hearing before the tribunal under the presidency of the local *juge de paix*. When the amount of the claim does not exceed 300 francs in all, the judgment is final; in other cases there is an appeal to the Civil Court, which gives its decision as in a commercial cause. The parties at the appeal may be represented either by a regular advocate or solicitor, or by a workman or master engaged in the same trade.

It will be seen from this summary that the *Conseils de Prud'hommes* partake largely of the nature of the old Fair Courts and Courts of the Merchants which flourished in England during the Middle Ages. They are subject to the limitation that they can only deal with existing contracts, and not with agreements for the future; and when the trade unions were legalised in France in 1884 the *Conseils de Prud'hommes* were proved to be unfitted for settling the serious conflicts that arose between capital and labour. A great colliers' strike in 1892 led to the passing of fresh legislation, which invested the local *juge de paix* with the power of acting as a conciliator when summoned by one party. "The fear of the justices of the peace is the beginning of wisdom," according to a recent adaptation of the old maxim; but when the wisdom does not exist it cannot be inculcated by penalties. The jurisdiction of that officer in labour disputes is only voluntary, and if the parties will not accept his mediation he has no compulsory powers. In the result, then, only 23 per cent. of industrial conflicts have been settled by the pacific machinery. The same weakness limits the *Conseils d'Industrie*, established by a decree of 1900, which are empowered to publish lists of fair wages.

The need for the establishment of some Arbitration Board with compulsory powers has made itself increasingly felt of recent years, but hitherto the projects to that end have not been successful in passing the Chamber. France still awaits a satisfactory solution of the problem.

Germany.—Industrial Courts (*Gewerbe-gerichte*) on the model of the French *Conseils de Prud'hommes* exist in the manufacturing towns of Germany, and a law of 1901 makes the appearance before them of the parties in dispute compulsory under penalties. This step marks an advance in the powers of this tribunal beyond the French standpoint, but they lack in Germany, as in France, a compulsory sanction for their judgments. Strikes, however, to some extent in Germany come within the penal law. The Imperial Industrial Code, which has been applied to the whole empire, secures the right of workmen and employers to combine with a view to causing a stoppage of work; but as agricultural labourers are not included in the sphere of the provision the various States may prohibit strikes among that class. In Prussia there is a statute in force to that effect. Moreover, services carried on by the State or municipal authorities primarily in the public interest do not fall within the scope of the "industrial" law, and therefore the right to strike and lock-out in these undertakings is not secured; and it is reported that at least 90 per cent. of the organised railway servants in the German State Railway administration belong to unions whose by-laws explicitly waive the claim to exercise the right to strike. The men are given facilities for bringing their grievances before the authorities by means of special committees (*Arbeiter-ausschüsse*), which are composed of representatives elected by the various groups of the staff in each district into which the railway system of the State is divided. Outside the State services, however, and the agricultural labourer class, strikes are legal and frequent, and it is calculated that not more than 20 per cent. of them are settled peacefully by the permanent conciliation machinery established by law.

The prohibition of strikes among those workmen who are engaged in the so-called public utility services exists also in Russia, Roumania, Holland, Belgium, and Italy. In the first two countries the law covers the whole field of public services, both central and local. In Belgium it applies to all State servants, including the employees in the railway, post-office, telegraph, and telephone services; and in Holland it is restricted to employees on the Government railway lines.

Denmark.—A bolder and more striking attempt to provide for the peaceful settlement of labour disputes than by the establishment of voluntary industrial Courts or the partial prohibition of strikes and lock-outs has been made by the small but economically very developed kingdom of Denmark. Following on the settlement of the great lock-out which occurred in 1899 in the building and other trades, the central organisations of employers and workpeople respectively established a Court of Arbitration which received the State

sanction by a law of 1900. The Act provided for the conferment by Royal Decree on any Industrial Arbitration tribunal of the power of summoning witnesses on subpoena, on condition that the Court has its seat in the capital, and that its president possesses the qualification for the position of judge in an ordinary Court of Justice. The scope of the conciliation machinery has been much extended by two later Acts passed in April 1910, which set up complementary methods of settlement, and transform the Arbitration Court into a permanent body. The one Act provides for the appointment of a Government Conciliator who holds office for two years at a time, and who, whenever a serious strike or lock-out has taken place or is impending, may on his own initiative or on the initiative of one party, summon the disputants to a conference. They are bound under penalties to appear and to give evidence. The Conciliator endeavours to bring about an amicable settlement, and may suggest the terms of an agreement with the assistance of two representatives of the parties, one elected by each organisation. The terms are not to be published without the consent of both parties unless a stoppage of work takes place and the Conciliator has concluded his efforts.

The second law establishes a permanent Arbitration Court consisting of twelve members—six regular arbitrators and six substitutes—together with a president, vice-president, and secretary. The compact character of the Danish people has rendered possible the creation of a single Danish Employers' Federation and a Trade Union Federation, and each of these bodies elects every year half the ordinary members of the Court, who in turn elect the president and vice-president, each possessing the qualification of an ordinary judge. It is the function of the Court to endeavour to make the parties to a labour dispute respect an agreement as to arbitration into which they have entered; and it has power to inflict fines on the party whom it finds guilty of having violated the terms of an agreement. Where there are extenuating circumstances, it may inflict no fine: and in the case of an illegal strike it may decide not to impose any penalty when the party against whom the strike is directed has, by acting in violation of an agreement, given the other party reasonable grounds for striking. Witnesses summoned before the Court are bound to appear, and its awards are final and are enforceable in the same way as judgment of the ordinary Courts. The tribunal therefore bears some resemblance to the Conciliation and Arbitration Court of the Commonwealth of Australia, though its functions and powers are more restricted, and its composition partakes more of the character of a conciliatory than a judicial body.

Switzerland.—Another small but highly developed country which has recently instituted elaborate State machinery for the settlement of labour disputes is the Swiss Confederation. The right to resort to strikes and lock-outs is implicitly comprised in the Federal Constitution of 1874, which guarantees the right of combination, and it is qualified only by the prohibition of a stoppage of work on the Federal Railways. But two of the twenty-five

Cantons which form the Confederation have passed far-reaching measures of legislation for dealing with strikes. A law enacted by the Canton of Geneva in 1904 supplements the powers of the *Conseils de Prud'hommes* by empowering employers' associations and workmen's trade unions which have been duly registered and whose by-laws have been approved by the *Conseil d'État* to establish scheduled rates of wages and fair conditions of labour for any trade. These bodies elect for the purpose, by secret ballot, a Board of delegates consisting of an equal number of either party, normally seven of each. To this Board is entrusted the task of settling the fair wage or other conditions of labour, and their decision must be voted by a majority of three-quarters of the delegates. Failing agreement, an attempt at conciliation must be made on the application of either party by the *Conseil d'État*. The scheduled rate of wages remains in force for a period of five years, and may then be renewed from year to year.

So far the provisions of the Act correspond in a general way with those of the Australian Wage Board Act, and the sections that follow have a general correspondence with the terms of the Australian compulsory arbitration enactments which forbid strikes. No general suspension of work may be instituted, whether by employers or employees, with the object of modifying a schedule in force or violating the decisions given by the Board. No penalties, however, are attached to this section, and it is stated by the British Minister at Berne that trade and labour associations have from time to time ordered strikes and lock-outs in defiance of the prohibition without having recourse to the conciliation machinery. Further, it has been suggested that this attempt to make strikes illegal is a breach of the Federal constitution. On the other hand, penalties are attached to the violation of a clause which prohibits a public appeal to strike, either by advertisements or publication or public meetings during the period of arbitration and conciliation provided for by the Act, and so long as the attempt to settle the dispute by such pacific means has not been made, as well as when a peaceful solution of the question at issue has been reached. The publishers and printers of any incitement to strike are punishable equally with the authors. The aim of the Act is to compel an intermediate resort to arbitration between a dispute and a strike, and, despite the defect in regard to the prohibition against seeking to disturb an agreement during its currency, it appears that the aim has been fairly well achieved, and that a considerable number of disputes have been settled by the arbitration machinery, either on the request of the parties in dispute or on the initiative of the *Conseil d'État*.

The second Swiss Canton which has passed a comprehensive measure for strengthening the machinery of conciliation in labour disputes is Basel, where a law of 1911 establishes a Permanent State Board of Conciliation. The Board has jurisdiction over all private industries, and has large compulsory powers. In the first place, it seeks to induce the parties to conclude a collective agreement; failing that, it invites them to submit the matter to arbitration, and—

what is a very remarkable innovation in such legislation in Europe—in certain cases the Government may insist on arbitration. The Board consists of three neutral members, *i.e.* of persons not connected with industry, who hold office for three years. It is constituted at present by a retired Judge of Appeal, a retired State Counsellor, and an economist. But if arbitration is accepted by the parties, industrial experts are appointed as assessors of the Court from among persons not directly interested in the dispute. An industrial dispute must be notified to the Board within ten days, and the maximum time allowed for conciliation is fourteen days; that for arbitration, a week. The Board has to submit to the Government each year a report of its work and to propose, if it thinks fit, any reforms of the existing industrial law.

The Swiss Acts appear in their scope to be a very striking attempt to grapple with the industrial problem, and they mark the tendency on the Continent, which follows here the experience of the English colonies, to establish permanent State tribunals of conciliation. Bodies like the *Conseils de Prud'hommes*, which can only meet when the parties are willing to accept their decision, are no longer adequate in countries where the labour movement is very developed; and, on the other hand, special commissioners or arbitrators appointed *ad hoc* at a crisis by the Government are not likely to command the confidence of the parties who are already in conflict. The experience of the Hague Court of International Arbitration has shown in another sphere the value of providing permanent machinery for the peaceful solution of differences. The existence of the machinery invites the disputant to employ it. And in labour questions the experience of Europe, as well as of the younger countries, goes to show that the conciliation Board or Court should not only be permanent but should have powers of compelling the parties to resort to it in the first place. It may not be feasible or desirable to prohibit strikes or lock-outs altogether, or to insist on arbitration in all cases, but what is feasible and desirable is to compel the postponement of forcible measures until peaceful methods of settling the conflict have been tried and failed, and to establish machinery to this end. If and when arbitration and conciliation are not successful, the final sanction must be left to public opinion. That appears to be the line of legislative development on the Continent, and although the dislike of State interference is very strong in this country, in this, as in other respects, our Parliament may learn, if not from our neighbours, at least from our children.

PERPETUITIES IN FRENCH LAW.

[Contributed by M. SHELDON AMOS, ESQ.]

THE French law of property has a reputation for much greater simplicity than the law of England on the same topic. And this reputation is borne out, on the whole, when we consider the enormous possibilities of complication which the subject offers, both by a study of the Code and its commentators, and by an examination of the classes of questions which give rise to litigation before the Courts.

It is, however, interesting to inquire whether this simplicity is entirely due to the positive provisions of the law, or whether it may not in part result from French legal and social traditions: in other words, whether there is anything in the law of France to prevent more remote and complicated interests and estates being brought into existence, were conveyancers and their clients so evilly disposed.

The principal question which we shall want to ask is how far it is possible for a French donor or testator to tie up his property for the future. How has the French legislator dealt with the problem of perpetuities?

As a preliminary to answering this question it will be convenient to set forth the fundamental rights *in rem* which in French law give an immediate or future right to exclusive possession. We shall then have to consider the "modalities" to which such rights may be subjected.

The Common Interests in Property.—The fundamental rights with which the French notary is concerned are the following:¹

(i) Full ownership (*pleine propriété*).

(ii) "Usufruct" or a right of possession and enjoyment for life or for a term of years²; with its corollary of

¹ This enumeration includes only interests which are recognised as rights *in rem* and which give an immediate or future right to possession. Thus on the one hand it does not include leases, and on the other it does not include servitudes, or collateral rights such as hypothec. According to the prevailing opinion, an ordinary lease does not create a right *in rem*—a leasehold interest is therefore not a "démembrement de la propriété," or as we may call it an estate carved out of the freehold. On the other hand, a "term of years" may be such an estate if created by way of usufruct or emphyteusis.

² A usufruct cannot be legally granted for a longer period than the lifetime of the usufructuary—it is essentially not heritable; and this rule is a matter of public policy (Planiol, *Droit Civil*, 2nd ed. i. § 1697); consequently a usufruct granted for a term of years terminates with the beneficiary's death, even if the term be not expired (Planiol, *ibid.* § 1699). In the somewhat unlikely event of a usufruct being granted to a corporation, its duration is limited by the Code (Art. 619) to thirty years.

(iii) *Nu-propriété*, or what is left of the *pleine propriété* after the usufruct is carved out of it.

(iv) *Propriété grevée de substitution*.—A parent may grant property to a child, or a childless person may grant property to a brother or sister, on the terms that at the grantee's death the property shall pass to his or her children—that is to say, to all the children in equal shares (Civil Code, 1048, 1049). A "substitution" creates two interests in the property granted: that of the first grantee (the "grevé"), and that of the "appelé" or remainder man.

(v) *Emphyteusis*.—This right, though admitted by the old law, was not regulated by the Civil Code. It was however recognised by the Courts, and was restored to the statute book by the law of June 25, 1902. An "emphyteotic lease," unlike an ordinary lease, confers upon the lessee a full right *in rem*, which may be hypothecated. Among other conditions to which it is subjected is one providing that it must be granted for not less than eighteen or more than ninety-nine years.

(vi) A mere restriction on an owner's power of alienation does not constitute, strictly speaking, an independent class of interest in property. It is, however, proper in this connection to mention that it is lawful, by marriage contract, to constitute certain property "biens dotaux" and such property is, broadly speaking, inalienable during the marriage.

Postponed Ownership.—Is it necessary for the validity of a grant of "propriété" that it shall take effect at once? Or may the operation of the grant be subordinated to the arrival of a term or condition?¹ The answer to the latter question is certainly in the affirmative with regard to "conditions." There is no doubt that ownership can be conveyed subject to a suspensive condition, just as it can be made defeasible by a resolutory condition. A contract to convey operates *ipso facto* as a conveyance, unless a contrary intention is declared ("promesse de vente vaut vente"), and there can be no dispute as to the legality of conditional promises to convey. It has been argued, however, that the right of property cannot be subordinated to a "term," because if it is agreed here and now that A is to be owner of a given thing for ten years to come, and that then B is to become owner, and this agreement is to take immediate effect *in rem* (as is the normal operation of agreements), the consequence is that A is deprived of one of the principal attributes of ownership, namely the right of alienation.²

¹ A "term" is a future event which is certain to happen some time or other, e.g. a named future date, or the death of a specified living person.

A "condition" is an uncertain event—as to whether it must necessarily be future, or whether it suffices for it to be unknown, the Code speaks with two voices (compare Arts. 1168 and 1181). The commentators take the view that it must be future (Planiol, *op. cit.* § 310; Baudry-Lacantinerie et Barde, *Des Obligations*, § 750). The question is perhaps merely a verbal one.

² Boissonade, *Projet de Code Civil Japonais*, accompagné d'un commentaire, i. p. 82. This abortive project of a Japanese Civil Code on French lines provides some interesting examples of what may be called legislative criticism of the French Code by a competent French jurist.

This argument is not in fact very forcible. A can always alienate what remains of his term of ownership, and if it is said that it is an essential attribute of ownership that the owner should be able to convey an estate of unlimited future duration, this is in effect to argue in a circle. Furthermore, it is not true in French law that such a power is a logically essential attribute of ownership; for a "grevé de substitution" is an undoubted example of an "owner" who has no such power.

It may be contended that a grant of ownership limited to take effect after a previous terminable ownership is a "substitution," and as such is forbidden by Art. 896 except in the cases previously alluded to. Art. 896 runs as follows: "Les substitutions sont prohibées. Toute disposition par laquelle le donataire, l'héritier institué ou le légataire sera chargé de conserver et de rendre à un tiers, sera nulle, même à l'égard du donataire, de l'héritier institué ou du légataire."

But this prohibition is of limited application. It is confined to gifts and wills, and to cases in which the first estate is terminated by the death of the beneficiary.¹

It may be asked whether the supposed object we are considering cannot always be attained in effect by the grant or reservation of a usufruct to A, and the grant of the "nu-propriété" to B. Substantially a usufructuary has the same powers and rights as a "grevé de substitution"²—that is to say, he has as wide powers and rights as are compatible with the security of the future interest: and there is nothing to prevent the grantor determining those powers and rights as he thinks fit. It is however to be remarked (though the point may be of somewhat academical interest) that, as has already been observed, a usufruct cannot, in the case of natural person, be given for a longer time than the life of the beneficiary: and it may very well be thought that a grant of Whiteacre by A to B to come into effect in fifty years' time would, if A died before that time, be construed as an attempted reservation of an exorbitant usufruct to A coupled with a grant of the "nu-propriété" to B: and in these circumstances B would be held entitled to immediate possession on A's death.

Conditional Grants.—We have already observed that there is no doubt that French law permits a grant of conditional ownership—or a conditional grant of ownership. A grants property to B on the condition that he shall be married and living in France at A's death. It is settled doctrine in France that "conditions are retroactive." But this only means that in the case of a conditional obligation, the realisation of the condition avoids all acts done by the promisor in conflict with the obligation.

In the case of the conditional grant of a right *in rem*, the realisation of the condition avoids incompatible grants made in the interval. The doctrine does not imply that as a necessary consequence the conditional grantee is entitled on the realisation of the condition to an account: this in

¹ Planiol, *op. cit.* iii. §§ 32, 78 ff.

² Planiol, *ibid.* § 3311.

any case is a matter of intention.¹ In the case of a grant by A conditional on the realisation of a certain state of things at A's death, it may be surmised that it would be held that A had intended to retain at least a usufruct : and a usufructuary of course does not have to account for profits.

The power of making conditional grants of ownership breaks down to a considerable extent the barriers imposed by the law respecting substitutions, and the Courts have shown great indulgence to this transparent device.² For example, A leaves a house to his eldest son B, on the *resolutive* condition that the latter dies childless, and leaves the same house to his second son C on the *suspensive* condition that B dies childless. Viewed as a substitution this is unlawful : viewed as a pair of reciprocally conditional grants it is lawful.³

The power of making conditional grants carries the possibility of creating future estates beyond the point attainable by the device of usufruct and unconditional "nu-propriété." For instance, it will be seen, on consideration, that it would be impossible to attain the results of the example just given without the employment of conditional grants.

Existence of Donee.—We have perhaps delayed too long in placing before the patient reader the very important provision of Art. 906 of the Civil Code, which dominates the whole subject of future interests, and which no device of "nu-propriété" or conditional ownership can elude.⁴ That article runs as follows: "Pour être capable de recevoir entre vifs, il suffit d'être conçu au moment de la donation. Pour être capable de recevoir par testament, il suffit d'être conçu à l'époque du décès du testateur."

The only exception to this rule is that the would-be creator of a "substitution permise" not only may, but must, limit the remainder after the life estate to all the children of the life-tenant "nés ou à naître" (Civil Code, Art. 1050).⁵

The Rule against Perpetuities.—To what extent do the powers and restrictions which we have been discussing permit a donor or testator to "tie up" his property? The reply appears to be—for a life or lives in being, and the period of gestation. In the case of a "substitution" there may be a further period of twenty-one years before the youngest surviving child attains his majority, during which the property may in fact be inalienable without the leave of the Court. But as we have recently been reminded, personal incapacity has nothing to do with perpetuities.⁶ The device of splitting the gift into two parts, the usufruct and the "nu-propriété," or that of

¹ Baudry-Lacantinerie, *op. cit.* § 824.

² Planiol, *op. cit.* iii. § 3295.

³ Of course to be beyond the reach of attack by the other heirs, if any, the value of the house would have to be not greater than the "quotité disponible."

⁴ Planiol, *op. cit.* § 329.

⁵ The question whether, when a gift is made by way of "stipulation pour autrui"—or shall we say "trust"?—the beneficiary must be in existence is a subject of controversy. See references in note on p. 54.

⁶ Cf. *Re Earl of Stamford and Warrington—Payne v. Grey*, *Times*, Dec. 18, 1911.

successive conditional gifts, goes no further, since the "nu-propriété" or the second conditional estate can only be given to a person in existence at the time of the gift.

Conditions in Defeasance of Freehold.—We have said that the device of conditional gifts does not provide a means of tying up property beyond one generation; and there is no doubt that where A gives property to B subject to a resolutive condition, and to C, suspensively, subject to the same condition, for the gift to be valid, both B and C must be in existence, as provided by Art. 906.¹ But suppose A makes a gift to B subject to a resolutive condition, and says no more: what is then the position? To use the analogies of English law A has created a "condition in defeasance of an estate of freehold," with a "possibility of reverter" in his own favour.²

In French law a gift may be made subject to a condition, whether suspensive or resolutive, so long as the condition does not have the effect of reserving to the donor the power of revocation at will ("donner et retenir ne vaut")³ and so long as it is not impossible, illegal, or immoral.⁴ To answer the question we have raised we have therefore to inquire what conditions tending to a perpetuity a French Court would consider to be illegal.

Restraint on Alienation.—There is one form of condition—perhaps the

¹ But see the remarkable case of *Evêque de Périgueux c. Ville de Périgueux*, decided by the Appeal Court of Bordeaux in 1891 and reported in Sirey, 1892, 2. 89. In that case a former Bishop of Périgueux had given 30,000 francs to the town of Périgueux to support schools taught by the Frères de la doctrine Chrétienne, providing that in the event of the schools ceasing to be so taught, the fund should revert to the bishop's successors in the see. The town adopted secular education; and the episcopal successor of the donor sought to enforce the gift over in his favour. The donor's heirs, on the other hand purported to revoke the gift, and claimed the restitution of the fund. The Court decided in favour of the bishop, holding that the conditional gift in his favour was a valid "stipulation pour autrui" under Art. 1121. A complete examination of this case would carry us far into the study of the remarkable extension given by the French Courts to the article cited—a process which has gone a long way to create a pretorian law of trusts. This case is the only one which has come to our notice, however, in which the tendency in question has made a distinct inroad into the principles restrictive of perpetuities. The decision can only be brought into harmony with Art. 906 by regarding the bishop as a corporation sole—a conception strange to French law, and in conflict with the reasoning of the Court, which expressly treated successive occupants of the see as strangers: for otherwise the "stipulation" would not have been "pour autrui."

² Mr. Challis argues that such a condition, in spite of the perpetuity to which it may give rise, is still good in English law, though he anticipates that at the present day the Courts would only agree with him with "great reluctance" (*Real Property*, 2nd ed. pp. 174-7).

³ Planiol, *loc. cit.* iii. § 2615; Fuzier-Hermann, *Code Civil Annoté*, Art. 894, 53 ff.

⁴ Art. 900 C.C. The rule against "potestative conditions" is evidently inapplicable to legacies. A potestative condition in favour of the donor, giving him the power of revocation *ad nutum*, avoids the gift. On the other hand an impossible, illegal, and immoral condition is "réputée non-écrite" and the donee or legatee takes absolutely. In the case of a conveyance for valuable consideration (à titre onéreux) an impossible, illegal, or immoral condition avoids the contract itself (Art. 1172).

most obvious form—tending to create a perpetuity as to which there is abundance of concordant authority.¹ A condition of perpetual inalienability is contrary to public policy and is illegal. If inserted in a gift or legacy the donee or legatee is entitled to ignore it and takes absolutely; if inserted in a conveyance for value it avoids the grant. On the other hand a condition providing for temporary inalienability is lawful, if the time is reasonably short, and if the donor, the donee, or even a third party have a legitimate interest in the property not changing hands. As to what may be taken as a reasonable time no strict rule has been laid down, but the Courts appear to have considered the lifetime of a living person to be the extreme limit. A clause in the will forbidding the beneficiaries to “administer, alienate, or hypothecate” the property bequeathed during forty years has been held bad.² A clause in a will has been struck out which forbade a legatee, who was married and aged fifty, and whose youngest child was aged eight, to alienate the property bequeathed until that child attained the age of twenty-five years.³

An example of a legitimate interest in the clause against alienation is offered by a case in which a proviso in a will was upheld whereby the legatee, who was directed to pay an annual allowance to a third party, was forbidden to alienate the property bequeathed during the lifetime of the recipient of the allowance, on the ground that the maintenance of the prohibition served to secure the payments stipulated.⁴

Remote Conditions.—In the case of general conditions prohibiting alienation the intention and effect of tying up the property is so evident that the rules which have been laid down by the Courts were practically inevitable. But what would be said, for example, of a grant or gift of real property in France subject to the resolutory condition that the owner should always be a French citizen? It is difficult to imagine a French Court holding that this condition was in itself illicit or contrary to policy: the only objection to it lies in its remoteness. And it does not appear that it is settled law, or even that it has ever been authoritatively laid down, that mere remoteness

¹ Planiol, *op. cit.* i. § 973 ff.; Fuzier-Hermann, *op. cit.* Art. 900, nn. 107 ff., and authorities there cited.

² Fuzier-Hermann, *ibid.* n. 125.

³ Fuzier-Hermann, *ibid.* n. 126. In another case it was held that a direction by a testator, written on the envelope containing a holograph will, that it should not be opened for a specified time, namely, during the lifetime of his sister, was bad, and must be ignored (Fuzier-Hermann, Art. 900, n. 81).

⁴ Fuzier-Hermann, *ibid.* n. 131.

It would be going somewhat too far into detail to examine the questions which have arisen as to the precise effect of a lawfully stipulated inalienability. For example, in what cases, if at all, can the clause be set up against the donee's or legatee's creditors? In the event of the deliberate breach by a donee or legatee of the prohibition to alienate it would seem that on principle the only right which arises is that of the donor or testator or his heirs to claim revocation of the gift or legacy. It would appear, however, that there is a tendency to assimilate the situation to the more familiar one of “biens dotaux,” and to treat the alienation as alone revocable (Sirey, 1894, i. 349, notes 5, 6).

suffices by itself to make a condition illicit. It would appear then that the position of the question is very similar to that of the validity of conditions in defeasance of an estate of freehold in England. Examples in either country are unlikely to be frequent—that is to say, examples of a perfectly clear-cut issue on the point, in which there can be no question of the intrinsic legality of the condition, and in which the possibility of its realisation may remain open indefinitely. Were such a case to arise, a French Court would doubtless be strongly influenced against authorising the creation of a state of things so inimical to free trade in property; but unlike the English Courts, they would not have at their disposal the mighty word “perpetuity.”¹

Impossibility of Entail.—It is hardly necessary to state that it is impossible in France to create anything in the nature of an estate tail; but it may be of interest to explain exactly why it is impossible, since a substitution operates for one generation only, and then divides the property equally amongst the children of the *grevé*. It cannot be done by the creation of a series of usufructs, since a usufruct can only be given to a person in being. It cannot be done by a condition imposed in the gift, as for example that the property should, rather than pass to any one other than the first taker's male representative, revert to the donor. For one reason because in view of the limited right of testation the first taker would not have it in his power to comply with the condition; and secondly because any such proviso would be held to constitute a “*stipulation sur une succession non ouverte*,” forbidden by Art. 1130.²

Accumulation.—Directions to accumulate income do not appear to be very common in French practice, and have certainly not led to any such enormities as, in England, caused the passing of the *Thellusson Act*. The subject is not one which has attracted much attention, and what light can

¹ An example of some practical interest is that in which a public authority has made a grant of land subject to a condition that only a certain area shall be built on it, or that a certain class of buildings shall alone be erected—a breach of the condition to defeat the grant. We are aware of no authority for the proposition that such a condition would, in French law, be bad for remoteness; and in the particular case we have supposed, and have in mind, where the grant is by a public authority, the Courts would be not unlikely to assimilate the condition to an exercise of legislative authority, or (to use American phraseology) to an exercise of the “police power.” It may be conceded, however, that the enforcement of such a condition after the lapse of a long period of time during which no attention had been called to it would have to run the gauntlet of considerable judicial hesitation; and it is not improbable that a Court would seek to find in the facts sufficient evidence of tacit waiver.

² By a *Senatus Consultum* of the First Empire (August 14, 1806) it was provided that perpetual substitutions known as “*majorats*,” and creating in effect an unbarrable estate of tail male, might be created with the authority of the sovereign in the case of property attached to a title of nobility. This law was repealed in 1835, and provision was made for the early extinction of all *majorats* saving only such as had been made “*de propre mouvement*” by the sovereign. It appears that there are some of these latter still in existence (*Planio*, iii. 3274).

be thrown upon it must be chiefly derived from considerations of general principle.

Let us suppose that A gives property to B, with the direction that the latter shall accumulate all or part of the income for a period of fifty years, and at the end of that time pay the accumulated fund over to C, and that thereafter B shall have the unencumbered ownership. As between A and B this is a "*stipulation pour autrui*" and confers a right of action upon C under Art. 1121. It is a matter of some doubt whether it is necessary that C should be in existence at the time that the stipulation is made¹; we will suppose therefore that C is in existence at that time. The fact that C may not continue to be in existence until the payment becomes due offers no difficulty, as not only can he at any time cause the stipulated right to vest absolutely by accepting it, but even the bare power to accept passes to his heirs.²

But is the direction to accumulate in itself lawful? In the first place, in so far as the performance of the imposed duty implies an obligation to retain the property from which the income arises in the promisor's hands, we have to take account of the rules, already discussed, relating to restraints on alienation.³

In view, furthermore, of the attitude of disfavour which, it may be confidently surmised, the French Courts would take up towards exaggerated accumulations, there are two texts of the Code itself which would very possibly be held to be applicable. Art. 943 lays down "*La donation entre vifs ne pourra comprendre que les biens présents du donateur; si elle comprend des biens à venir, elle sera nulle à cet égard.*" It would not, it is submitted, be a great straining of this article to hold that it forbids a gift of future income by way of "*stipulation pour autrui.*"⁴

Again, there is a provision of the law relating to "*rentes constituées*" which might, not impossibly, be held applicable. A "*rente constituée*" is a

¹ Planiol, ii. § 1299. Where a duty is imposed upon B in favour of C, by way of direction or "*charge*" accompanying a legacy to the former, C acquires a right of action against B. In this case C's right of action is based not upon Art. 1121—he is not the beneficiary of a "*stipulation pour autrui*"—but rather upon the view that he himself is a legatee; and his right against B is modelled upon the right which B has against the heirs or the executor. In this case also the question whether C must be in existence *ab initio* is a matter of controversy (Paniol, iii. § 3020).

² Planiol, i. § 1307; Fuzier-Hermann, Art. 1121, n. 19.

³ A direction to accumulate income may be held to imply a prohibition to alienate. In a case decided by the Paris Court of Appeal (Sirey, 1894, 2. 93) a testator had directed that sums left to a minor should be invested, under the direction of a third party, in French Rentes, until the legatee attain the age of twenty-five, and that the excess of income over expenditure necessary for the legatee's support should be invested in the same manner and for the same time. It was held that this direction was equivalent to a prohibition to alienate, which in this case was lawful.

⁴ In the case cited in the previous note the donee of the accumulated income was also the donee of the fund from which it was to be derived; it was not a clear case of a separate gift of future income.

periodical payment stipulated in exchange for a capital sum "que le prêteur s'interdit d'exiger" (Art. 1909). The "rente" may be agreed to be payable either during a single lifetime or for ever (Art. 1910).

But Art. 1911 goes on: "La rente constituée en perpétuel est essentiellement rachetable. Les parties peuvent seulement convenir que le rachat ne sera pas fait avant un délai qui ne pourra excéder dix ans, ou sans avertir le créancier au terme d'avance qu'elles auront déterminé." When a "rente" is payable during the lifetime of the beneficiary, the debtor has no power of liberating himself by paying down an appropriate capital sum (Art. 1979 C.C.); but where the "rente" is not "viagère" but perpetual, the debtor cannot be bound for more than ten years ahead.

Now this rule conveys a strong suggestion that direction to a donee or legatee to accumulate all or part of the income of the property given or bequeathed, for the benefit of another and for more than a short time, would be held to be void as contrary to public policy. Enough has been said on this somewhat speculative subject; and we may conclude with the surmise that the French Courts would, if called upon to do so, apply to accumulations, *mutatis mutandis*, rules analogous to those which they have worked out for restraints upon alienation.

Conclusion.—The result of our inquiry is that the provisions of the Civil Code provide the French Courts with what are, on the whole, very effective weapons against any attempt to create perpetuities or accumulations. To some devices designed to evade the spirit of the law the Courts have shown themselves indulgent. But speaking broadly it is very difficult, if not impossible, to tie up property beyond one generation. And it must not be forgotten that the whole subject is reduced in France to a secondary rank of importance by the rules which limit the right of disposition by way of gift or will to that proportion of the net value of the donor's or testator's estate which constitutes the "quotité disponible."

THE GREAT JURISTS OF THE WORLD.

XV. JEAN-BAPTISTE COLBERT AND THE CODIFYING ORDINANCES OF LOUIS XIV.

[Contributed by H. A. DE COLYAR, ESQ., K.C.]

JEAN-BAPTISTE COLBERT,¹ the famous Minister of Louis XIV.² during the middle, and best, period of the latter's reign,³ is identified with so many

¹ At the time of his death Colbert was Marquis de Seignelai et de Châteauneuf-sur-Cher, Baron de Sceaux, Lumières, and other places (see Jal's *Dictionnaire de Biographie et d'Histoire*, tit. Colbert, p. 399).

² Louis XIV.'s principal merit is said to have consisted in his allowing himself to be guided by such a mind as Colbert's, which was so vastly superior to his own (Bonnehose's *History of France*, 1862, English edition, p. 399). It should, however, be remembered that Louis XIV. himself was a man of strong character and great ability, in whom there was, according to Cardinal Mazarin, the wherewithal to make four good kings and one honest man (Martin's *History of France*, 4th ed. vol. xiii. p. 4), while, in the opinion of Lord Acton, he was by far the ablest man born in modern times on the steps of a throne (*Lectures on Modern History*, by Lord Acton, p. 234), and his reign, if Voltaire is to be believed, of greater value to France than twenty ordinary reigns (*Siècle de Louis XIV.*, vol. xviii. of Voltaire's *Collected Works*, published in 1819, p. 206).

³ That is to say, from 1661 to 1683. Cardinal Mazarin died on March 6, 1661, and on the following day Louis XIV. summoned to the Louvre the Chancellor Séguier and the three Secretaries of State, namely, Nicholas Fouquet (Superintendent of the Finances), Michel Le Tellier (Minister of War), and Hugues de Lionne or Lyonne (Minister of Foreign Affairs), to whom he intimated, in the course of an address, that though, till then, he had allowed the late Cardinal to govern the country, in future he would be his own prime minister ("Je serai, à l'avenir, mon premier ministre"); to whom, however, ministers could, when invited to do so, give advice. The Chancellor was, accordingly, forbidden to seal any document without the King's command, while the Secretaries of State were directed not to sign anything without the King's permission (Martin's *History of France*, 4th ed. vol. xiii. pp. 549, 550). Many doubted (and notably Fouquet) whether the young King, then only twenty-two and a half years of age, would persevere in his resolution henceforward to govern in person. How completely this doubt was falsified is proved by the fact that Louis XIV. held the reins of power in his own hands for fifty-four years (*i.e.* till his death on September 1, 1715), and never once relaxed his hold of them (Martin's *History of France*, 4th ed. vol. xiii. p. 4). During this long period Louis XIV., who possessed an excellent memory and immense fertility of resource, is said to have devoted nine hours a day to public business (*Lectures on Modern History*, by Lord Acton, p. 234). The first eleven years, however, of the young King's personal government (*i.e.* from 1661 to 1672) were so much influenced by the ideas of Colbert that the reign of Louis XIV. and the biography of his great minister are almost identical (*Cambridge Modern History*, vol. v. p. 15; and see Martin's *History of France*, 4th ed. vol. xiii. p. 35). It was not, however, until 1669 that Colbert attained the full rank of Secretary of

splendid achievements¹ that his claim to recognition as a jurist and law reformer is apt to be somewhat overlooked. To the ordinary student of French history Colbert figures as an able and successful financier,² as the

State, though for some years previously he had really conducted most of the affairs of State (*post*; Martin's *History of France*, 4th ed. vol. xiii. pp. 23, 33, 34; Colbert, *Promoteur des Grands Ordonnances de Louis XIV.*, by Alfred Aymé, p. 11). In view of these circumstances, it is a little difficult to understand why Lord Acton should refer to Colbert as though the latter had been already, at the date of Mazarin's death in 1661, a departmental minister (*Lectures on Modern History*, by Lord Acton, p. 234), though undoubtedly for some little time previously to the death of Cardinal Mazarin, Colbert had *secretly* and unofficially assisted Louis XIV. in overhauling Fouquet's financial budgets (see *post*); and, moreover, as far back as 1649 had been appointed a *Conseiller d'État* at the instance of Michel Le Tellier, with whom Colbert was connected by marriage.

¹ See *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. 1. When, in 1669, Colbert was appointed Secretary of State, he was also given the control of the navy, commerce, the colonies, the King's household, Paris, ecclesiastical matters, and the government of L'Île de France and of L'Orléannais (Martin's *History of France*, 4th ed. vol. xiii. pp. 33, 34). He then only became the equal, in official rank, of obscure ministers whose names history has scarcely preserved (*ibid.*). It was, however, primarily as a great financier that he obtained recognition as a first-class statesman. But "les finances n'étaient pour Colbert qu'un point d'appui, d'où il allait saisir toutes les branches de la puissance publique. Il était prêt pour tout, et propre à tout" (Martin's *History of France*, 4th ed. vol. xiii. p. 32), and eventually obtained the control of nearly all the departments of government (*Colbert, Promoteur des Grands Ordonnances de Louis XIV.*, by Alfred Aymé, p. 11).

² When still working behind the scenes and unknown to fame, Colbert, on August 31, 1659, wrote to Cardinal Mazarin that "les finances avaient grand besoin d'une chambre de justice, sévère et rigoureuse" (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. ii. part i. p. xiv) and that he could not conscientiously associate any longer with Fouquet, the Superintendent of Finance, who had ceased to be honest and devoted to the State (*ibid.* p. v; and see Martin's *History of France*, 4th ed. vol. xiii. p. 24). The Cardinal accordingly, shortly before his own death, advised the King to employ Colbert to help him secretly to discover Fouquet's financial delinquencies—a work which Colbert continued to discharge down to September 15, 1661, when Fouquet's arrest, which had been decided upon some months previously, took place (see Martin's *History of France*, 4th ed. vol. xiii. pp. 26, 27, 28; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. ii. part i. p. xiv; *Life and Times of Louis XIV.*, by G. P. R. James, vol. iii. pp. 101, 122). After a trial which lasted practically for four years, and in which all forms of law are said to have been violated in order to secure a conviction, Fouquet was, on December 20, 1664, condemned to perpetual banishment—a sentence which was immediately, and somewhat harshly, altered by the King to one of imprisonment for life (see *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. ii. part i. pp. 1 *et seq.*; *Life and Times of Louis XIV.*, by G. P. R. James, vol. iii. pp. 141, 142), being, *semble*, the only instance in the history of modern Europe of a monarch commuting a gentler for a severer punishment (*Life and Times of Louis XIV.*, by G. P. R. James, vol. iii. p. 142). Colbert and Le Tellier, who are accused of having entertained towards Fouquet a vindictive hatred (*Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 80), and who certainly worked together for his destruction, had hoped for Fouquet's condemnation to death (*ibid.* pp. 141 *et seq.*; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xxvii) for high treason—a sentence which, in view of the evidence produced at the trial, would not, it seems, have been altogether illegal and unwarrantable (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. ii. part i. p. ii). Marshall Turénne, in reference to the part taken by Colbert and Le Tellier in the Fouquet trial, said: "Je crois

founder of the French Navy,¹ as the reviver of the commerce of France,² as

que M. Colbert a plus d'envie qu'il soit pendu, et que M. Le Tellier a plus de peur qu'il ne le soit pas" (*ibid.* p. xxvii). Colbert's uncle by marriage, Henri Pussort, seems to have shared his nephew's dislike of Fouquet. At all events he spoke for four hours, with great vehemence and passion, against Fouquet at the latter's trial (*Lettres de Madame de Sévigné*, 1862 ed. vol. i. p. 469). Immediately after Fouquet's disgrace, Colbert, first in March 1661, as Intendant of Finance, and eventually in December 1665, as Comptroller-General of Finance, proceeded to realise his projects of financial reform (Martin's *History of France*, 4th ed. vol. xiii. p. 39), introduced into the public accounts order, regularity, and simplicity, and adopted a new system of collecting revenue. He paid off, at the price of their original purchase, the Rentes which had been acquired by public moneylenders at sums far below their face-value, and endeavoured to put the State on the footing of a great mercantile community (see, generally, *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. ii. part i. pp. xiv. et seq.; *Life and Times of Louis XIV.*, by G. P. R. James, vol. iii. pp. 168 et seq.). Moreover, he made Fouquet's partisans, as they were called, disgorge the public moneys they had appropriated (*ibid.*). By these means Colbert was enabled to remit some taxation and replenish the exhausted exchequer; and he eventually trebled the public revenue, but did not make it depend on the growth of private incomes or the execution of useful public works (*Lectures on Modern History*, by Lord Acton, p. 244). Owing, however, to the great wars carried on by Louis XIV. during the latter part of Colbert's administration, the financial condition of France gradually degenerated until national insolvency was again almost reached, and Colbert, much against his will, was obliged to revert to measures for raising money which he had himself condemned when adopted by Fouquet (Voltaire's *Collected Works*, published in 1819, vol. xviii. pp. 220, 221).

¹ In lieu of the thirty old ships left by Cardinal Mazarin at the time of his death in 1661, ten years later—*i.e.* in 1671—France possessed, thanks to Colbert, 270 battleships of all kinds, besides thirty galleys, and 52,000 sailors (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iii. part i. p. iv), while the sum annually spent on the navy, which in Mazarin's time never exceeded two millions of livres, under Colbert was seldom less than six times that amount (*ibid.*). Colbert also established ports and arsenals, where the fleet could repair any damage (*ibid.* p. viii), and likewise promoted l'Ordonnance pour la Marine, which was a sort of Marine Code (see *post*). His efforts on the part of the navy were, after his death, maintained by his eldest son, the Marquis de Seignelai, who succeeded to his father's post as Minister of Marine, in which he displayed marked ability (Martin's *History of France*, 4th ed. vol. xiv. p. 2), and during his brief career considerably increased the strength and power of the navy (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. ii. part. i. p. iv). Colbert also provided for the land defences of his country, and, in doing so, caused to be erected a triple line of fortresses on the north and east of France, for the protection of the frontiers (*Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, p. 224; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. v. *passim*).

² Commerce did not thrive under Richelieu or Mazarin. It was, however, greatly encouraged by Colbert, who caused trading companies to be established, which it was declared all persons might join without compromising their nobility (Martin's *History of France*, 4th ed. vol. xiii. p. 117). French manufactures, and notably those of Lyons silk, and also for the making of the lace known as Point de France or Point d'Alençon, near which town Colbert possessed a château (Voltaire's *Collected Works*, published in 1819 vol. xviii. p. 190), and the tapestries of Gobelins and Beauvais (*ibid.*) were encouraged by Colbert, who was also largely instrumental in founding the manufacture of Sèvres porcelain and plate glass (*The Monarchy of France, its Rise, Progress, and Fall*, by William Tooke, F.R.S., p. 456). He also made several commercial treaties. Moreover, besides opening up for navigation rivers which, according to Pascal, are "les chemins qui marchent" (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iv. pp. cxii et seq.),

the developer of the French colonial possessions,¹ as the encourager and protector of agriculture,² as the creator and restorer of great national public buildings,³ and as the patron of literature, science, and art.⁴ And yet, though Colbert united in his person all these different titles to historic fame, which some consider entitle him to be regarded as the greatest Minister in the annals of mankind,⁵ without excepting even Sully and Richelieu, not to

he promoted the construction, by De Riquet, of the Canal Languedoc, which connects the Bay of Biscay with the Gulf of Lions (*ibid.* p. lxxix), and purchased from Charles II. of England the port of Dunkirk, in order to receive the commerce of the North (Martin's *History of France*, 4th ed. vol. xiii. p. 286). The economic precept *laissez faire* was, it has been stated, borrowed by the eighteenth century (*Lectures on Modern History*, by Lord Acton, p. 12) from Colbert, according to whom: "La liberté est l'âme du commerce. Il faut *laissez faire* les hommes qui s'appliquent sans peine à ce qui convient le mieux; c'est ce qui apporte le plus d'avantage" (Colbert in *Comptes Rendus de l'Institut*, xxxix. p. 93). L'Ordonnance du Commerce of 1673 was mainly the work of Colbert (*post*, p. 79).

¹ Colbert reorganised the French colonies in Canada, Martinique, and St. Domingo, besides founding others at Cayenne and Madagascar and Pondicherry (*The Monarchy of France, its Rise, Progress, and Fall*, by William Tooke, F.R.S., p. 456; Martin's *History of France*, 4th ed. vol. xiii. pp. 113 *et seq.*; *Chambers's Encyclopædia*, vol. iii. p. 337). The Code Noir (L'Ordonnance Coloniale), though issued after Colbert's death, was due to his inspiration (*post*).

² See Martin's *History of France*, 4th ed. vol. xiii. pp. 34, 35; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iv. *passim*, pp. xl. *et seq.* Colbert stimulated, as far as possible, the multiplication of cattle and the acclimatisation of foreign animals, and renewed the exemption from seizure for taxes, etc., of cattle and beasts of burden (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iv. pp. xlvii, xlviii), which exemption was first established by Sully in the time of Henri IV. (Bachelet's *Les Grands Ministres Français*, pp. 329 *et seq.*).

³ In 1664 Colbert became, by purchase, Superintendent of Buildings. Besides (sorely against his inclination) transforming Versailles from a shooting lodge into a palace, enlarging and adorning Les Tuileries, the Louvre, Fontainebleau, St. Germain, and Chambord, he greatly beautified Paris (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. v. p. xli), entrusting this work mainly to the architects Perrault and Blondel (*ibid.* p. xlix).

⁴ The creation of the Academy of Inscriptions and Medals, of the Academy of Sciences, of the Academy of France in Rome, of the Academy of Architecture, and of that of Music, are due to Colbert (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. v. p. liii; and see Clément's *Histoire de Colbert*, vol. ii. chap. xxvi. pp. 229 *et seq.*). He also founded a Professorship of Civil Law in 1679 (*The Monarchy of France, its Rise, Progress, and Fall*, by William Tooke, F.R.S., p. 456), while, during his administration, the Royal Library was removed to a more suitable place, and the books were increased in number from 16,000 to 40,000 (Bonnechose's *History of France*, 1862 ed., translated by William Robson, p. 397). On May 21, 1667, Colbert was made a member of the Academy of France, and pronounced the customary oration (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. v. pp. lviii, lviii).

⁵ Bonnechose's *History of France*, 1862 ed., note by translator, William Robson, p. 399, where it is stated that the real glory of the reign of Louis XIV. begins and ends with Colbert, as the glory of Thebes rose and fell with Epaminondas. If Louis XIV. obtained the title of Great, it was mainly due to Colbert (*Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, p. 223), after whose death the monarchy declined in power and importance.

mention Mazarin,¹ he was also the promoter of the great codifying ordinances of Louis XIV.,² in which character it is proposed mainly to consider him in this brief essay.

Before, however, concentrating attention on this aspect of Colbert's public career, it is desirable to give a few particulars of his life and origin. Jean-Baptiste Colbert was born at Rheims on August 29, 1619,³ and his parents were Nicholas Colbert and Marie Pussort. His father, who, in the early part of his career, does not appear to have been always solvent,⁴ was engaged in some commercial pursuits at Rheims, and was probably a cloth, wool, or silk merchant,⁵ though it has been stated that he was first a wine merchant, and then a clerk to a notary.⁶ Colbert's mother was the sister of Henri Pussort, who eventually became a distinguished councillor of the Parliament of Paris, and one of the two selected by the King to be "au conseil royal des finances."⁷ His association with Colbert in notable projects of law reform will presently be noticed.⁸ Colbert was, moreover,

¹ Mazarin has been termed "the ablest and most successful of Ministers" (*Lectures on Modern History*, by Lord Acton, p. 235) and "a statesman of the highest rank" (*ibid.* p. 236).

² *Recueil Général des Anciennes Loix Françaises*, by Isambert and others, vol. xviii. p. 103. According to the President Hénault: "Colbert qui a rétabli les finances porta ses vues plus loin; justice, commerce, marine, police, tout se ressentit de l'esprit d'ordre qui a fait le principal caractère de ce ministre et des vues supérieures dont il envisageait chaque partie du gouvernement" (*ibid.*).

³ Bachelet's *Les Grands Ministres Français*, tit. Colbert, p. 368; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xxiii. The baptismal certificate for the parish of St. Hilaire, Rheims, leaves no doubt as to the date and place of Colbert's birth. Nevertheless, it has been stated that the date of his birth was August 22, 1619 (Martin's *History of France*, 4th ed. vol. xiii. p. 21), that he was born in Paris in 1619 (Chalmers' *General Biographical Dictionary*, vol. x. p. 15), and that the event took place at Rheims, but not until 1625 (*Life of Famous John Baptist Colbert*, done into English in 1695, p. 3). In 1825, on the occasion of the coronation of Charles X., there was placed in a house in the Rue de Cérès, near to the Place Royale at Rheims, a tablet on which was engraved, in letters of gold, the following inscription—namely: "Jean-Baptiste Colbert, Ministre d'État sous Louis XIV., est né dans cette maison le 29 Août 1619" (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. pp. 473, 474).

⁴ *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xxiii. Colbert's father is sometimes referred to as Nicolas Colbert de Vandière (*ibid.*). He eventually became Seigneur de Vandière, Governor of Fimes, Maître d'Hôtel in Ordinary to the King (*Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, pp. 208 et seq.), and Trésorier de l'Extraordinaire des Guerres (Bachelet's *Les Grands Ministres Français*, pp. 329, 403).

⁵ See *Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, pp. 208 et seq.; *Life of Famous John Baptist Colbert*, done into English, published 1695, p. 3; A. Jal's *Dictionnaire de Biographie et d'Histoire*; Colbert's *Life*, by Clément, 2 vols.

⁶ *Ibid.* The author of *Les Soupçons de la France esclave*, published in Colbert's lifetime, refers to him, contemptuously, as "fils d'un marchand de Rheims" (*Lettres, Instructions et Mémoires de Colbert*, *supra*, vol. i. p. 467).

⁷ See Martin's *History of France*, vol. xiii. p. 77; *Mémoires du Duc de Saint-Simon*, vol. i. p. 411.

⁸ *Post*; and see Clément's *Histoire de Colbert*, vol. ii. pp. 291 et seq.; *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186.

connected with Michel Le Tellier,¹ whose sister was the wife of Colbert's uncle, Jean-Baptiste Colbert de Saint-Pouange,² a man of considerable commercial and financial repute, who ultimately attained to high official rank.³

As regards Colbert's remote ancestry little need be said. When, indeed, he became famous as a statesman, efforts were made to trace his descent from a younger branch of a noble, if not royal, Scotch family, supposed to have settled in France in the latter part of the thirteenth century.⁴ This origin Colbert by no means repudiated, but, on the contrary, is suspected of having endeavoured to uphold, by somewhat unworthy means.⁵ It is, however, more than probable that Colbert's family was, in fact, of respectable, but thoroughly bourgeois, origin,⁶ and it is certain that one branch of it

¹ Le Tellier ultimately became Chancellor, and was Secretary of State down to 1666 (Voltaire's *Works*, published in 1819, vol. xviii. p. 36). His son, Francis Michel Le Tellier, Marquis de Louvois, one of the greatest of French War Ministers, became Colbert's great rival towards the end of the latter's public career. Louvois was the evil and Colbert the good genius of Louis XIV. (*The Life and Times of Louis XIV.*, by G. P. R. James, vol. iv. p. 60; and see also *Lectures on Modern History*, by Lord Acton, p. 239).

² *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xxiv.

³ See *Nouvelle Biographie Générale*, vol. xii. pp. 101, 102; *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 81.

⁴ Giles Ménage, a genealogist who was, it may be mentioned, eventually deprived by Colbert of a pension (*Life of Famous John Baptist Colbert*, done into English in 1695, p. 228), pretended to have traced Colbert's descent from the Kings of Scotland (*ibid.*), while Colbert himself claimed to belong to an ancient and noble Scottish family named Cuthbert (Clément's *Life of Colbert*, vol. i. p. 519; Chalmers' *General Biographical Dictionary*, vol. x. tit. Colbert), a younger branch of which was alleged to have settled in France in 1281 (*Biographie Universelle, Ancienne et Moderne*, vol. ix. pp. 208, 225). Letters Patent of James II. of England, registered in Parliament May 21, 1687, attest that Colbert was descended from noble and illustrious Scotch parents, on both the paternal and maternal side (see Clément's *Histoire de Colbert*, vol. i. Appendix, pp. 519-32, where the ancestry of Colbert is fully discussed). Colbert bore on his coat-of-arms a snake (Latin, *Coluber*; French, *Couleuvre*) impaled, in allusion to his name, and the whole Colbert family eventually adopted the same device (Jal's *Dictionnaire de Biographie et d'Histoire*, p. 399). The Barons of Castelhill have been cited as common ancestors of the Colberts of Scotland and France, and as having the same coat-of-arms (*Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, pp. 208 *et seq.*). For further information as to pedigree of the Colbert family, see *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. Appendix, pp. 467 *et seq.*

⁵ It has been stated on good authority that, by Colbert's orders, a stone slab placed over the tomb of his grandfather (a wool merchant) in the Church of des Cordeliers at Rheims, was secretly removed and another substituted for it, on which Colbert had had engraved, in old characters and language, an account of the supposed chivalrous exploits of a Scottish knight (one Richard Colbert), together with the legend, "En Écosse j'eus le berceau, et Rheims m'a donné le Tombeau" (Bachelet's *Les Grands Ministres Français*, tit. Colbert, pp. 329-403; *Nouvelle Biographie Générale*, vol. xii. pp. 100, 101; *Life of Famous John Baptist Colbert*, done into English in 1695, p. 228; *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 78; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. Appendix, p. 471).

⁶ Martin's *History of France*, 4th ed., vol. xiii. p. 21; *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 81; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément,

settled at Troyes and the other at Rheims,¹ in both of which cities, and also in Paris, members of the Colbert family were engaged in commerce, and held in honourable repute, in the sixteenth and seventeenth centuries.²

It should, however, in fairness be stated that, in 1667, Colbert was, it appears, able to furnish proofs of nobility, which had to be produced to enable one of his sons to obtain admission into l'Ordre de Malte.³ Probably such proofs were not too critically examined by officials only too anxious to gain the thanks and approval of a powerful Minister.

Of Colbert's childhood no reliable details are forthcoming, though it has been affirmed that a profound reserve and impenetrable discretion distinguished even his earliest years.⁴ His personal appearance can hardly have been attractive,⁵ if, as stated by some of his contemporaries, his mien was low, dejected, and stern, not to say forbidding.⁶ In spite, however, of this

vol. i. pp. xxii. According to the Abbé Choisy, Colbert had great pride in ancestry (Bachelet's *Les Grands Ministres Français*, tit. Colbert, pp. 329 *et seq.*), but, nevertheless, was honest enough to tell his eldest son the truth about his origin in these words—viz.: "Coquin, tu n'es qu'un petit bourgeois, et si nous trompons le public, je veux au moins que tu saches qui tu es" (*Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 79; *Mémoires de l'Abbé de Choisy*). Moreover, in writing to his son, he (Colbert) truthfully stated: "Mon fils doit bien penser et faire souvent réflexion sur ce que sa naissance l'aurait fait être, si Dieu n'avait pas béni mon travail et si ce travail n'avait pas été extrême" (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. Appendix, p. 468).

¹ *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 81.

² *Nouvelle Biographie Générale*, tit. Colbert, vol. xii. pp. 100, 101; Jal's *Dictionnaire de Biographie et d'Histoire*, tit. Colbert. Colbert's great-uncle, Odoart Colbert, who was born in the sixteenth and died in the seventeenth century, was originally a merchant of Troyes, who eventually extended his business operations to Antwerp, Frankfort, Lyons, Venice, and Florence, where he established branch houses for the distribution of the products of Champagne (see Martin's *History of France*, 4th ed. vol. xiii. pp. 21, 22; *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 79; *Nouvelle Biographie Générale*, *supra*).

³ *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xxiii.

⁴ *Éloge de Jean-Baptiste Colbert* (1783), p. 3. The following anecdote of Colbert's early manhood is worth repeating: When in the service of Michel Le Tellier (see *post*), and by his order, Colbert delivered to Mazarin, then at Sedan, a letter from the Queen Mother (Anne of Austria). Colbert had strict instructions not to leave the letter in the Cardinal's possession, but to return with it, after his Eminence had read it. Mazarin, wishing to retain the letter, had recourse to various stratagems to enable him to do so, which, however, entirely failed, owing to Colbert's firmness and fidelity to his trust. When, in subsequent years, Colbert, on Le Tellier's recommendation, entered the service of Mazarin, the latter remembered the incident just described, but as one wholly to Colbert's credit (Chalmers' *Biographical Dictionary*, tit. Colbert, vol. x. pp. 15 *et seq.*; *Life of Famous John Baptist Colbert*, done into English in 1695, p. 4; Jal's *Dictionnaire de Biographie et d'Histoire*, tit. Colbert).

⁵ See *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 80. The best portrait of Colbert, which hardly seems to justify the somewhat unfavourable written descriptions of his personal appearance, was by Nanteuil (Martin's *History of France*, 4th ed. vol. xiii. p. 23).

⁶ *Life of Famous John Baptist Colbert*, done into English in 1695, p. 3; Jal's *Dictionnaire de Biographie et d'Histoire*, tit. Colbert.

unprepossessing external appearance, he was, as has been remarked, of the race of lions and not of foxes,¹ though his extreme caution and discretion may, in the opinion of some, somewhat belie this description of his character. Certainly, if his contemporaries are to be believed, he was a man of few words, who regarded long conversations as so much time lost, and seldom returned a verbal answer to a question of any importance until the proposition put before him had been first reduced into writing for his more careful consideration.² His industry and attention to business were such, and his complete mastery of details so exceptionally complete and accurate,³ that it has been stated of him that no man was ever more laborious and diligent.⁴ Whether his apprehension was as quick as that of Cardinal Mazarin may perhaps be doubted,⁵ though it must certainly have been far above the average. He slept but little, and was most temperate in his diet, and knew only one sort of repose—namely, that experienced by change of work, or by passing from one difficult task to one less difficult.⁶ As a man's nickname sometimes affords a clue to his character, it is perhaps worth mentioning that Colbert was called by some "*Vir marmoreus*,"⁷ and that Madame de Sévigné dubbed him "*Le Nord*," and trembled at the very idea of seeking an audience of him.⁸

Though Colbert was undoubtedly, in the main, the architect of his own fortunes, and obtained his ultimate promotion to the highest ministerial rank in France by his own personal merits and exertions,⁹ he did, nevertheless, owe his first introduction to public life to his uncle, Jean-Baptiste Colbert de Saint-Pouange (already mentioned),¹⁰ who rescued Colbert from the commercial career for which he was originally destined,¹¹ and, in

¹ Martin's *History of France*, 4th ed. vol. xiii. p. 23.

² *Life of Famous John Baptist Colbert*, done into English in 1695, p. 3; *Éloge de J. B. Colbert* (1783), p. 3.

³ *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xxi.

⁴ *Ibid.* vol. v. p. lviii; *Dictionnaire de l'Académie*, ed. of 1694, Preface. Like Napoleon I. (see Sloane's *Life of Napoleon*, vol. iii. p. 163), Colbert never seems to have found the limit of his capacity for work.

⁵ Martin's *History of France*, 4th ed. vol. xiii. p. 22.

⁶ *Mémoires de Charles Perrault*, p. 34.

⁷ Bachelet's *Les Grands Ministres Français*, tit. Colbert, pp. 329 *et seq.*

⁸ *Ibid.*; and see *Lettres de Madame de Sévigné* (annotated edition, 1862), vol. iii. p. 33.

⁹ *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xxxi.

Colbert might truly have exclaimed with Corneille, "Je ne dois qu'à moi seul toute ma renommée" (*Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, pp. 208 *et seq.*).

¹⁰ *Ante*, p. 61.

¹¹ *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 81; Martin's *History of France*, 4th ed. vol. xiii. p. 22. In his early youth, Colbert was sent to Paris, and then to Lyons, to learn commerce, returning eventually to Paris, where he passed from the office of a notary (said to have been the father of the poet Chapelain) into that of a procurator (*procureur*), and then became a clerk "chez un trésorier des parties casuelles" (Martin's *History of France*, 4th ed. vol. xiii. p. 22; *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. pp. 79 *et seq.*). Whether Colbert was ever in the service of Mazarin's bankers,

1648,¹ procured for him employment under Michel Le Tellier, at that time either Comptroller-General of Finance or Minister of War.² Under this distinguished statesman, Colbert, thanks, in no small measure, to the commercial, legal, and financial training he had already received,³ exhibited great aptitude for business and those eminent qualities of head and heart which determined Le Tellier to introduce and recommend for office his protégé to Mazarin,⁴ who soon gauged Colbert's worth,⁵ and, besides entrusting him with several delicate diplomatic missions,⁶ eventually appointed him his steward (*intendant*), and finally made him one of the executors of his will.⁷ So well satisfied indeed was Mazarin with Colbert's supreme gifts in administrative

Cesanni and Maserani, appears to be doubtful (*Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 81; *Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, pp. 208 et seq.).

¹ This was also the year of Colbert's marriage to the wealthy Marie Charon, the child of James Charon (Sieur de Minars, and a native of Blois) and of Marie Begon (*Life of Famous John Baptist Colbert*, done into English in 1695, p. 6; Martin's *History of France*, 4th ed. vol. xiii. p. 22). By her he had nine children, who all achieved distinction, in the Government, Church, or Army (Bachelet's *Les Grands Ministres Français*, tit. Colbert). One of his daughters married the Duc de Chevreuse, and the other the Duc de Beauvilliers. Colbert's eldest son, better known as the Marquis de Seignelai, who by some is said to have owed his success in life to propitious circumstances rather than to individual merit (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iii. part ii, pp. ii and xli), while others assert that he was at least as able a man as his father (Voltaire's *Collected Works*, published in 1819, vol. xvii. p. 35; *Lettres de Madame de Sévigné*, annotated ed. 1862, vol. ix. pp. 582, 583), hoped, according to a published letter of Madame de Maintenon, to succeed to all his father's various posts (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iii. part ii. p. xv; Martin's *History of France*, 4th ed. vol. xiv. p. 2), and did, in fact, become Minister of Marine, in which office he rendered good service to his country (*ibid.* vol. iii. part i. p. iv; Voltaire's *Collected Works*, published in 1819, vol. xvii. p. 35). He only survived his father seven years, dying November 3, 1690, aged thirty-nine (*Lettres de Madame de Sévigné*, annotated ed. 1862, vol. ix. pp. 582, 583). Another son of Colbert was Marquis de Blainville et d'Amory, who held certain Court appointments, of which he was deprived in favour of Michel Le Tellier's son, Louvois (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iii. part ii. p. xvi). One of Colbert's sons became Archbishop of Rouen.

² Jal's *Dictionnaire de Biographie et d'Histoire*, tit. Colbert.

³ Martin's *History of France*, 4th ed. vol. xiii. p. 22.

⁴ *Ibid.*; *Mazarin et Colbert*, by Comte de Cosnac, vol. i. p. 81.

⁵ Colbert, on the other hand, did not at first appreciate Mazarin's greatness of intellect, though he eventually estimated the Cardinal's qualities at their true worth (Martin's *History of France*, 4th ed. vol. xiii. pp. 22, 23).

⁶ These missions comprised one to Rome to Pope Alexander VII., to induce the latter to restore to the Duchy of Parma the Duchy of De Castro, and to help the Venetians (*Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, p. 210). Prior to this mission Colbert was created Marquis de Croissi (*ibid.*), and he eventually became Marquis de Seignelai, a title subsequently borne, after Colbert's death, by his eldest son.

⁷ *Mazarin et Colbert*, by the Comte de Cosnac, vol. i. pp. iii et seq.; *The General Biographical Dictionary*, new edition by Alexander Chalmers, F.S.A., vol. x. tit. Colbert, pp. 10 et seq.; Jal's *Dictionnaire de Biographie et d'Histoire*, p. 395 *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. 101.

and financial matters,¹ both in public and private life, that, when dying,² he recommended Colbert to Louis XIV. in the following words, namely: "Je vous dois tout, Sire, mais je crois m'acquitter en quelque sorte avec votre majesté en vous donnant Colbert."³ The King, however, scarcely needed this recommendation from his dying Minister, as, for some time before Cardinal Mazarin's death, Colbert had, as already stated, secretly helped Louis XIV. to investigate and criticise Fouquet's daily statements of account, and in so doing had revealed to the King talents which were not unmixed with genius.⁴ Still, it was not until some months after Mazarin's death that Colbert was, upon Fouquet's disgrace, made *intendant* of the finances, while his appointment as Comptroller-General of Finance was deferred until 1665.⁵ Colbert's subsequent career was one of rapid advancement in the public service, to which the age in which he lived was undoubtedly favourable, for the constitution of France then consisted in its being a government through Councils, to which, with few exceptions, neither birth nor rank gave any right of admission.⁶ Hence it was that bourgeois like Colbert, Bossuet, and Louvois were employed by, and in high favour with, the Grand Monarque, who became *par excellence* the King of the Merchant Classes,⁷ and was quite content that his nobles should remain courtiers rather than statesmen. This policy may have been, in part, dictated by dread lest those who were born in the purple should in time, if promoted to fill high offices of State, become powerful enough to attack and limit the rights and prerogatives of the Crown itself.⁸ At all events, it is

¹ As Richelieu and Mazarin may be said to have been the founders of *political* despotism, so Colbert may be regarded as the founder of *administrative* despotism (*Mazarin et Colbert*, by the Comte de Cosnac, vol. i. p. 5).

² Mazarin's recommendations of Colbert to Louis XIV. are said to have been almost his last words.

³ *Éloge de Jean-Baptiste Colbert*, p. 4; *Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, p. 211; Martin's *History of France*, 4th ed. vol. xiii. p. 26; *Mémoires de Choisy*, p. 579.

⁴ Martin's *History of France*, 4th ed. vol. xiii. pp. 26, 27; *Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, pp. 210, 211. Louis XIV. recognised in Colbert "l'homme solide, l'homme des choses sérieuses; le serviteur dévoué; le merveilleux instrument du pouvoir royal, le génie qui créait et avait l'habileté de faire croire à son maître qu'il ne faisait qu'obéir aux pensées du souverain" (*Jal's Dictionnaire de Biographie et d'Histoire*, p. 395).

⁵ *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. ii. part i. p. xlix.

⁶ *Cambridge Modern History*, vol. v. p. 3; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. Appendix, pp. 467 et seq.

⁷ *Social France in the Seventeenth Century*, by Cecile Hugon, p. 147; and see *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. 467, where a passage is cited from a work, published in Colbert's lifetime, called *Les Soupirs de la France Esclave qui aspire après sa liberté*, complaining of the admission into the Government of bourgeois like Louvois and Colbert.

⁸ Introduction by Charles Sarolea to Nelson's abridged edition in French of the *Mémoires du Duc de Saint-Simon*

certain that, after Colbert's death, and when his eldest son, the Marquis de Seignelai, and Louvois were no more, Louis XIV., with no one of sufficient intellect and strength of character to thwart him, reigned supreme over a Ministry composed of persons who may fitly be described as "titled clerks."¹

It is not proposed to trace at greater length Colbert's general career as a Minister, especially as its principal achievements have already been briefly recorded on an earlier page²; and, moreover, form the subject of detailed notice in the volumes of French history and works of general biography. Attention must, however, now be called to Colbert's position as a jurist and law reformer.

That Colbert should, amidst his many other absorbing occupations, covering at one time, as has been seen, the whole field of departmental administration,³ have had time and courage to initiate and superintend the Herculean task of consolidating and amending the laws of his country, may well amaze the most strenuous statesman of modern times. He possessed, however, a powerful incentive to action in the knowledge that in an age which, in its ideals and efforts, both political and literary, typified order and authority,⁴ the administration of justice throughout France, but especially in the provinces, was both irregular and corrupt.⁵ This was partly due to the rival claims of innumerable feudal Courts, as against Royal Magistrates and one another,⁶ for, notwithstanding the encroachments of the Crown on its independence, feudal justice still subsisted, though in a confused, arbitrary, and corrupt form.⁷ Moreover, both Civil and Criminal Procedure were in a more or less imperfect condition, and, in the interest of humanity and the speedy administration of justice, demanded simplification and reorganisation, while the brutality of the punishments attached to crimes sorely needed mitigation, seeing that, instead of reforming the criminal himself, or acting as deterrents, they seemed calculated to have, and in fact had, a precisely opposite effect.

¹ *François de Fénelon*, by Viscount St. Cyres, p. 45.

² *Ante*, p. 56.

³ Martin's *History of France*, 4th ed. vol. xiii. pp. 33, 34; *Lettres, Instructions et Mémoires de Colbert*, by P. Clément, vol. i. p. 50; *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 11. From 1661 to 1672 were the most glorious years for Colbert, and when his ideas reigned supreme (Martin's *History of France*, 4th ed. vol. xiii. p. 35).

⁴ *Cambridge Modern History*, vol. v. p. 15.

⁵ *Ibid.* The extraordinary assizes held in Auvergne, at Clermont-Ferrand, called "Les Grands Jours d'Auvergne," must have revealed the existence of many abuses calling for reform (Martin's *History of France*, 4th ed. vol. xiii. pp. 69 *et seq.*).

⁶ *Ibid.*

⁷ *Ibid.* In the reign of Philip II. of France (called Philip Augustus) the administration of justice by feudal lords was curtailed, and they were no longer allowed to decide cases according to their mere caprice, while, at the same time, judges were appointed to try and determine causes in accordance with settled law.

It was, then, in such conditions as these that Colbert, actuated by noble and sincere motives, urged Louis XIV. to signalise, if not immortalise, his reign, then already becoming famous on other grounds, by giving his sanction and an impulse to a great scheme of legislation, designed to reduce into one body all the existing ordinances,¹ thereby rendering jurisprudence fixed and certain throughout the entire kingdom, and also destined to bring about a necessary reduction in the number of persons invested with judicial power.² That Colbert did not fully achieve all that he hoped to accomplish as a law reformer was certainly not his fault.³ He did, however, initiate that codifying process which eventually produced the Codes Napoléon, and thereby aided the work of bringing the customary law of France again into harmony with the Roman law.⁴

From an undated paper in Colbert's handwriting, which reveals his idea of codification, it is evident that he was well aware that such an idea was by no means original, though he seems to have considered that Henry III. alone, amongst previous French kings, had planned to reduce the whole of the ordinances of the country into a single body,⁵ assigning the execution of this task to the President Brisson, who did indeed compile what is termed the "Code Henry," which, however, never came into actual operation.⁶

In Colbert's time, and indeed before the great Revolution, the civil

¹ *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, pp. 15, 16, 17; *Précis de l'Histoire du Droit Français*, etc., by Paul Viollet, p. 185; *Cours élémentaire d'Histoire du Droit Français*, 2nd ed., by Adhémar Esmein, p. 785.

² *Précis de l'Histoire du Droit Français*, etc., by Paul Viollet, p. 185; *Biographie Universelle, Ancienne et Moderne*, vol. ix., tit. Colbert, p. 216.

³ See *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 17.

⁴ *Studies in History and Jurisprudence*, by James Bryce, D.C.L., pp. 107, 376, 377; *Manuel de Droit Français*, 9th ed., by Judge Pailliet, p. viii. Ever since the discovery, in the reign of Louis VII. (Le Jeune), in the twelfth century, of a copy of the Institutes of Justinian, the Roman civil law had, in the greater part of Europe, and notably in France, become the absorbing study of the learned.

⁵ *Histoire de la Procédure Criminelle in France*, by Adhémar Esmein, p. 173; *Clément's Histoire de Colbert*, vol. ii. p. 297; *Manuel de Droit Français*, 9th ed. by Judge Pailliet, p. xiv. Ideas of codification have been attributed to earlier French kings than Henry III. —namely, to Charles VII., Louis XI., and Henry II. (see *The Civil Laws of France*, by D. M. Aird, p. 19), not to mention Henry III's successor, Henry IV. (*Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 14). Moreover, these royal projects of codification were seconded by many eminent jurists of the sixteenth century in their writings (*ibid.*), while Colbert himself resumed the work at an auspicious moment, seeing that Domat was then composing his treatise on civil law (*ibid.*) and, Lamoignon, First President of the Parlement de Paris, was contemplating and evolving a scheme of unified and general legislation for the whole kingdom of France (*ibid.*), in which work there was eventually associated with him the learned jurisconsult Barthélimi Auzanet (*Précis de l'Histoire du Droit Français*, etc., by Paul Viollet, p. 184).

⁶ See authorities in preceding note. La Garde des Sceaux Marillac had, in a measure, the same fate as the Code Henry (*Histoire de la Code Criminelle en France*, by Adhémar Esmein, p. 178).

legislation of France was divided into two general systems, namely, the customary and the written law, each of which branched into a multitude of subdivisions.¹ There were upwards of 180 customs, extending more or less over the various provinces of France.² In many parts of the country, though less in Provence and Languedoc, the Roman law had gone back into that shape of a body of customs from which it had emerged a thousand years before, while in Northern and Middle France some customs, and especially those relating to land, were not Roman at all.³ Independently of customary law and written law, considered as local law, France was also governed by Roman law, the laws of the Prince, and the decisions of the local Parliaments (Parlements).⁴

Having once secured the King's sanction and approval of his scheme for the amendment and codification of the law,⁵ Colbert lost no time in carrying it into execution, and at once proceeded to settle the essential preliminaries.⁶ Accordingly, a Council was created to make all needful preparations, to discover and discuss existing defects and abuses, and to devise remedies for them.⁷ Two classes of persons only were, in the first

¹ *The Civil Laws of France*, by D. M. Aird, p. 20.

² *Ibid.* According to one authority, before the Revolution French legislation comprised not less than fifty general customs and 225 local customs, without taking into account those provinces which were under the written law (*Dictionnaire Usuel de Droit*, by Max Legrand, avocat, tit. Code, p. 189).

³ *Studies in History and Jurisprudence*, by James Bryce, D.C.L., p. 107.

⁴ *The Civil Laws of France*, by D. M. Aird, p. 19. The "Parlements" must not be confounded with Les États Généraux (National Assemblies), which were summoned at uncertain intervals by the King, and in some reigns not at all, though they alone were supposed to grant subsidies to the Crown and sanction the levying of contributions from the people (see Judge Pailliet's *Manuel de Droit Français*, vol. i. p. x). The Parlements were Courts of Justice, and the first of these to be established was the Parlement de Paris, in the year 1302, by Philip IV. (le Bel), down to which time a Court of Justice from the earliest period followed the person of the King, a practice which was found to be irksome, and led to the gradual establishment of eleven Sovereign Courts or Parlements, in various parts of France (*The Monarchy of France, its Rise, Progress, and Fall*, by William Tooke, F.R.S., p. 208). In 1674 Louis XIV. himself gave Parlements, or Sovereign Courts, to Franche-Comté at Dol, and afterwards at Besançon (*ibid.*). For a very interesting account of "Le Parlement de Paris et les autres sur son modèle," see *Mémoires du Duc de Saint-Simon*, 1857 ed. vol. xi. chap. XVII. pp. 306 *et seq.*

⁵ Colbert communicated his plan to Louis XIV. about the year 1664 or 1665 (*Histoire de la Procédure Criminelle in France*, by Adhémar Esmein, p. 180). Louis XIV. was in the habit of attributing to himself the primary idea of codifying ordinances (*ibid.* p. 177).

⁶ *Ibid.*; and see Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, pp. 15 *et seq.* The Ordonnance Civile was prepared with the greatest solemnity (*Recueil Général des Anciennes Loix Françaises*, vol. xviii. p. 103). These preliminaries about to be described were prior to the issue of the Ordonnance Civile, but the history of this Ordinance may be regarded as the history of all the ordinances, and especially of the Ordonnance Criminelle of 1670 (*Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 206).

⁷ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 17; and see Martin's *History of France*, 4th ed. vol. xiii. pp. 67 *et seq.*

instance, employed as members of this Council—namely, eminent jurists—consults and members “du Conseil du Roi,” to the exclusion of such members of the Parlement de Paris¹ as were not ministers, and also to the exclusion of the judicial body (Le Corps Judiciaire).² This Council, termed the Conseil de Justice, was subdivided into three sections.³ Of these, the first had assigned to it ecclesiastical affairs, the second matters concerning the nobility, while to the third section was relegated, in a special manner, all that related to civil and criminal justice and police.⁴ Colbert was himself a member of the last-named section, at the sittings of which, in his absence, his ideas and wishes were ably represented and expounded by his uncle, Henri Pussort,⁵ in whom he had complete confidence.⁶

To aid the Council in its work, and to enable it to fulfil its duties effectually, by Colbert's advice, given to the King, memoranda were obtained from legal experts in various parts of the country detailing the abuses to be remedied and suggesting remedies.⁷ Moreover, also by Colbert's advice and direction, inquiries were set on foot among recognised and effective bodies (Corps compétents) with a view to obtaining valuable and reliable information, and, further, while the Council was maturing its projects, eight able and trustworthy Maîtres des Requêtes⁸ were despatched to do duty in all the “Parlements du Royaume,”⁹ to ascertain and receive complaints and criticisms, and to forward same to the Conseil de Justice, certain members of which were specially deputed to receive all reports and communications from

¹ *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186; *Cours élémentaire d'Histoire du Droit Français*, by Adhémar Esmein, 2nd ed. pp. 785 *et seq.* The dislike conceived by Louis XIV. and Colbert to the Parlement de Paris, and to some of the Provincial Parlements, dated from the troublous times of the Fronde, when grave excesses were committed which were connived at, if not inspired by, les Parlements (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xx). Colbert is supposed to have meditated fatal designs against the Parlement de Paris, and partly on this account had no wish to associate any of its members in his proposed legislative reforms (*Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186; *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 179).

² *Cours élémentaire d'Histoire du Droit Français*, by Adhémar Esmein, 2nd ed. pp. 785 *et seq.*

³ *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 17; *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 179.

⁴ *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, p. 17.

⁵ *Ibid.*; and see *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186.

⁶ *Martin's History of France*, 4th ed. vol. xiii. p. 77.

⁷ *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, p. 17; *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186. These memoranda still exist in the Bibliothèque Nationale (*Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 180). Of these memoranda Henri Pussort's was the only one to which Colbert attached real importance and which he analysed (*ibid.*).

⁸ They received special instructions from Colbert himself (*Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 17). A Maître des Requêtes was a member of the Council of State, next in rank to a counsellor.

⁹ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 194.

the *Maîtres des Requêtes*, and to maintain a regular correspondence with them.¹

The first sitting of the *Conseil de Justice* is said to have taken place after Mass on September 25, 1665,² at the Louvre, in the King's study, and in the presence of Louis XIV., who presided over it in person, and delivered an allocution.³ From that moment the great work may be said to have commenced, and it was continued, without interruption, to its conclusion and achievement.⁴ The *Conseil* used to assemble at least every fifteen days (and generally under the presidency of the King himself), when the articles adopted by the *Commission de Justice*⁵ were submitted for deliberation.⁶

The second sitting, which was also held at the Louvre in the King's presence, took place, it is believed, on October 11, 1665,⁷ and seems to have been a notable one.⁸ It was at this sitting that Louis XIV. interrogated the different members of the *Conseil de Justice*, asked each of them his advice, and decided to divide the matters in hand into principal heads, confiding each of these to two or more members, who, after discussing them with some famous advocates, were required to report their views thereon to the King, to whom the final decision was, however, reserved.⁹ Colbert himself also spoke at great length on the same occasion, praising the King and expounding in detail the scheme recommended for adoption.¹⁰

¹ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 194; and see Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 17.

² There appears to be some difference of opinion in regard to the date of the first sitting. Thus, while the date given in the text is vouched for by one authority (*Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 194), according to another authority the first sitting took place on October 10, 1665 (Martin's *History of France*, 4th ed. vol. xiii., p. 77, note 1), while October 28, 1666, has also been mentioned as the correct date (*ibid.*; Isambert's *Recueil Général des Anciennes Lois Françaises*, vol. xviii. pp. 103, 104).

³ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 194. At this first sitting, besides the Chancellor Séguier, who knew so little of the project in hand that he appears to have blundered somewhat (*Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 194), there were present MM. Voisin, Hotman, de Villeroy, d'Aligre, Le Tellier, De Lyonne, De Verthamon, Poucet, Boucherat, and Henri Pussort (*Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186; *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 195).

⁴ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, pp. 194, 198.

⁵ See Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 19.

⁶ It has been stated that the sittings of the *Conseil de Justice* commenced October 28, 1666, and continued every week, and sometimes lasted for many days, down to February 10, 1667 (Isambert's *Recueil Général des Anciennes Lois Françaises*, vol. xviii. p. 104).

⁷ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 196. Those who differ as to the date of the first sitting of the *Conseil de Justice* must, it is believed, also be taken as disputing the dates of the second and some of the subsequent sittings.

⁸ *Ibid.* MM. d'Estampes, de Morangis, and de Sève figure, for the first time, at this second sitting of the *Conseil de Justice*, while M. Poucet's name disappears (*ibid.*).

⁹ *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186.

¹⁰ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 198.

It is quite unnecessary to refer to each of the several sittings held by the Conseil de Justice, but it should be noted that it was not until January 26, 1667, that, by the King's express command, Lamoignon, the First President of the Parlement de Paris, who had previously explained to Louis XIV. his own ideas on codification,¹ appeared at the Conseil de Justice, accompanied by an imposing deputation of Presidents of Courts of Justice in their robes of office, and wearing their judicial caps.² From this period the Conseil de Justice represented both the Parlement de Paris and the Conseil, and continued its work, mainly, if not invariably, in the house, and largely under the direction, of the Chancellor Séguier.³ The members of the Parlement de Paris were, however, not permitted to take part in the preparatory labours undertaken in respect of all the codifying ordinances promoted by Colbert, but only in respect of those relating to the Civil and Criminal Ordinances.⁴ The other ordinances were, it appears, framed in strict accordance with Colbert's original plan, which completely ignored, for purposes of consultation, the members of the Parlement de Paris.⁵

It was during the sittings of the Conseil de Justice, and while the Civil and Criminal Ordinances were under discussion, that the ancient independence of the Parlement de Paris, admirably defended by its First President, Lamoignon, seemingly against Henri Pussort, but, in fact, against Colbert and Louis XIV.,⁶ expired.⁷ Nevertheless, the Parlement itself emerged from this ordeal, stricken indeed, but still alive, while Lamoignon, its discreet First President, on the day that the first of the ordinances (L'Ordonnance Civile) was registered, was still able to reserve to the Parlement de Paris the

¹ *Précis de l'Histoire du Droit Français*, by Paul Viollet, pp. 185, 186, 187.

² Isambert's *Recueil Général des Anciennes Lois Françaises*, vol. xviii. p. 104, note 1; Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 19; *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 187. These Presidents of Courts of Justice were, on account of their headgear, termed "Présidents à Mortier" (*ibid.*).

³ *Précis de l'Histoire du Droit Français*, by Paul Viollet, pp. 186, 187. The first of these sittings in Chancellor Séguier's house was held on January 26, 1667, and the last on March 17 of the same year; there were altogether fifteen of these sittings (Isambert's *Recueil Général des Anciennes Lois Françaises*, vol. xviii. p. 104, note 1). While the sittings of the Conseil de Justice were being held, six advocates, designated by the King for the purpose, prepared "les éléments," and, together with the First President and members of the Parlement de Paris, discussed the titles and articles of the proposed ordinance (Clément's *Histoire de Colbert*, vol. ii. pp. 304 *et seq.*; *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 192; *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. vi. p. 21).

⁴ *Cours élémentaire d'Histoire du Droit Français*, 2nd ed., by Adhémar Esmein, p. 788.

⁵ *Ibid.*; and see Martin's *History of France*, 4th ed. vol. xiii. p. 77.

⁶ Louis XIV.'s recollection of the excesses committed during the Fronde, which obliged him to quit his capital and go from province to province in order to assist at the siege of the revolted towns, caused him, when he became his own master, to punish "les Parlements," and especially "le Parlement de Paris," as the inciters, if not the authors, of the riots and insurrections; in thus acting he was supported by Colbert (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. p. xx).

⁷ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 187.

right of remonstrance, but veiled indeed by such necessary and delicate flatteries as were exacted by the presence of an autocratic sovereign,¹ who, in 1673, completely abrogated such right of remonstrance.²

The history of the discussions which took place at all the different sittings of the Conseil de Justice is not fully known, though the subsequent conferences between the members of such Conseil and the delegates of the Parlement de Paris were eventually published, and afforded means for the correct interpretations of the Ordinances themselves when issued.³

It was on April 20, 1667, that the first of the codifying ordinances—that is to say, l'Ordonnance Civile, sometimes called the Code Louis⁴—was registered⁵ and without the necessity of any *lit de justice* being held by the King to compel its registration.⁶ This Ordinance, which was in itself a veritable Code of Procedure,⁷ contained thirty-five articles. The Preamble⁸

¹ *Precis de l'Histoire du Droit Français*, by Paul Viollet, p. 187.

² *Ibid.* p. 189.

³ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 194.

⁴ Martin's *History of France*, 4th ed. vol. xiii. p. 78.

⁵ *Ibid.* p. 186; Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, pp. 19, 20.

⁶ When a Parliament refused to register an Ordinance, Edict, or Declaration, a *lit de justice*, or séance royale, was held, at which the King, by his own absolute authority, compelled the registration, in his presence, of any such Ordinance, Declaration, or Edict (*Manuel de Droit Français*, 9th ed., by Judge Pailliet, p. x). Ordinances and Edicts came into operation on the day of their registration (*ibid.* p. ix). From the time of Louis IX. (Saint-Louis), the laws which previously had been called Capitularies and Établissements were termed Ordinances or Edicts (*ibid.*), and these were addressed to the Parlements and Sovereign Councils to publish and transcribe on their Registers (*ibid.*). Declarations were letters patent, issued by the King, which applied, reformed, or revoked Edicts or Ordinances, and, like them, had to be registered (*ibid.*). The Arrêts du Conseil, which were issued by the King, *mero motu*, interpreted Edicts, Ordinances, and Declarations (*ibid.*). Often the Parlements and Sovereign Councils addressed remonstrances to the King on particular Edicts, Ordinances, and Declarations before registering them, or only registered them with certain restrictions and modifications, so that an article rejected by one Parlement or Sovereign Council was sometimes accepted by another (*ibid.* p. x). Thus l'Ordonnance Civile of 1667 and l'Ordonnance Criminelle of 1670 were not received in Lorraine (*ibid.*, and see Clément's *Histoire de Colbert*, vol. ii. pp. 314 *et seq.*). The right of remonstrance was abolished, in the case of the Parlement de Paris at all events, in 1673 (*supra*).

⁷ Martin's *History of France*, 4th ed. vol. xiii. p. 178.

⁸ The Preamble was, in substance, as follows: "Louis, etc. . . Comme la justice est le plus solide fondement de la durée des états, qu'elle assure le repos des familles et le bonheur des peuples, nous avons employé tous nos soins pour la rétablir par l'autorité des lois au-dedans de notre royaume après lui avoir donné la paix par la force de nos armes—c'est pourquoi, ayant reconnu, par le rapport de personnes de grande expérience, que les ordonnances sagement établies par les rois nos prédécesseurs pour terminer les procès étaient observées différemment en plusieurs de nos cours, ce qui causait la ruine des familles par la multiplicité des procédures, les frais des poursuites, et la variété des jugements; et qu'il était nécessaire d'y pourvoir et rendre l'expédition des affaires plus prompte, plus facile, et plus sûre, par le retranchant de plusieurs délais et actes inutiles, et par l'établissement d'un style uniforme dans toutes nos cours et sièges. A ces causes de l'avis de notre conseil et de notre certaine science, pleine puissance, et autorité royale, nous

and first eight Titles were, at the time, considered to be of the highest legal and political importance,¹ while the entire Ordinance, which it is not, however, proposed to examine in detail, aimed, like those which were subsequently issued, at producing a complete, systematic, and detailed codification of a branch of law of wide and general importance.² According to the intentions of its framers and editors, this particular Ordinance was principally designed to diminish the length of law-suits, to reduce their cost, and also to simplify procedure.³ Its very first article was styled "de l'observation des ordonnances," and provided that all Ordinances, Edicts, and Declarations are to be "gardées et observées par toutes nos cours de parlement, grand conseil, chambres des comtés, cours des aides et autres nos cours, juges, magistrats, officiers, tant de nous que des seigneurs, et par tous nos autres sujets, même dans les officialités,"⁴ and further declares "tous arrêts et jugements qui seront donnés contre la disposition de nos ordonnances, édits et déclarations, nuls et de nul effet et valeur ; et les juges qui les auront rendus responsables des dommages et intérêts des parties, ainsi qu'il sera par nous avisé."⁵ The length in point of time of adjournments before the various civil tribunals was likewise prescribed by this Ordinance,⁶ which also forbade the use of certain dilatory pleas, which experience had proved to result in the needless prolongation of trials and increase of costs.⁷ Moreover, in order to stifle at an early stage of a law-suit

avons dit déclaré, et ordonné, disons, déclarons, et ordonnons, et nous plait ce qui ensuit" (*Recueil Général des Anciennes Loix Françaises*, by Isambert and others, 1829, vol. xviii. pp. 103, 104, 105).

¹ *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 186. The following are the headings of the eight Articles referred to in the text—namely : I. De l'observation des ordonnances ; II. Des ajournements ; III. Des délais sur les assignations et ajournements ; IV. Des présentations ; V. Des congés et défauts en matière civile ; VI. Des fins de non-procéder ; VII. Des délais pour délibérer ; VIII. Des garans (Isambert's *Recueil Général des Anciennes Loix Françaises*, vol. xviii. pp. 105 et seq.).

² *Cours élémentaire d'Histoire du Droit Français*, 2nd ed., by Adhémar Esmein, p. 785. This method of codification introduced by Colbert was afterwards continued in the reign of Louis XV. (*ibid.*).

³ *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 22.

⁴ Title I. Art. 1 (Isambert's *Recueil Général des Anciennes Loix Françaises*, vol. xviii. p. 106).

⁵ Title I. Art. 8 (Isambert's *Recueil Général des Anciennes Loix Françaises*, vol. xviii. pp. 106, 107). This particular article was stoutly resisted by Lamoignon, First President of the Parlement de Paris, and other Parliamentary deputies, as being derogatory of the dignity and honour of the judicial Bench (*Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, pp. 20, 21). This want of confidence in the judges is also indicated by an Edict of 1673, prohibiting judges from taking fees or salaries in excess of the sum prescribed by law, and which the First President of the Parlement was required to fix, until the financial condition of the State could permit of gratuitous administration of justice (*Anciennes Loix Françaises*, Tit. XIX. p. 86). By Title II. Art. 14 of the Ordonnance Civile, ushers and bailiffs were required to be able to read and write.

⁶ Ord. Civ. Tit. II. ; and see *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, pp. 22, 23.

⁷ Ord. Civ. Tit. VI., IX. and XIV. ; and see *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 25.

useless and unfounded litigation, litigants were, by the same Ordinance, obliged to supply copies of the proofs on which they relied in support of their cases.¹ L'Ordonnance Civile also carefully regulated and defined the right and limits of appeal from one court to another, reduced the time for the exercise of such right from thirty years to three years and six months,² and prescribed the cases in which judges might be challenged.³ By the same Ordinance, a distinction was established between commercial debts and civil debts, and the enforcing of the latter, by means of corporal restraints, regulated and restricted.⁴

With regard to the holding of inquiries by witnesses (Enquêtes),⁵ l'Ordonnance Civile contained various provisions, and prohibited their being held by deputies,⁶ while "les enquêtes par turbes" et "celles d'examen" were abolished.⁷

On the subject of registration of births, deaths, and marriages the Ordinance under consideration contained various enactments, and, as some previous ordinances had also done,⁸ placed these "Actes de l'État Civil," as they are termed, almost entirely in lay hands,⁹ whereby they forfeited their exclusively religious character and significance.¹⁰ Nevertheless, the French

¹ Ord. Civ. Tit. II. Art. 6; Tit. III. Art. 5. These proofs were termed *pièces justificatives*.

² Ord. Civ. Tit. XXVII. Art. 12.

³ *Ibid.* Tit. XXIV.

⁴ *Ibid.* Tit. XXXIV.

⁵ *Ibid.* Tit. XXII. In the early history of the French Courts the maxim, "*Temoins passent lettres*," prevailed (Boddington's *French Law of Evidence*, p. 92), but gradually, by various causes, including the spread of printing and writing, the rule contained in this maxim was, in February 1566, reversed by Art. 54 of l'Ordonnance sur la réforme de la justice (commonly called l'Ordonnance de Moulin de 1566). Accordingly, even at the present day, in civil (as distinguished from criminal) causes in France witnesses give their testimony in chambers, not in open Court, under a special procedure known as "Enquête," conducted before a judge specially appointed for the purpose, sitting in chambers (Boddington's *French Law of Evidence*, pp. 2, 92, 93; Code Civil, Book III. Tit. III. Arts. 1341 *et seq.*). This testimony, when given, comes before the Court in written form only, and the judges composing such Court have to sort out the wheat from the chaff, and form their opinion upon the facts which they consider relevant and proved (*ibid.*). In short, it is true to say in France that "le principe qui domine notre droit civil, relativement à la preuve testimoniale, est que celle-ci n'est admissible que dans des cas exceptionnels permettant visés par la loi; il n'est pas permis d'appliquer ce mode de preuve par analogie" (*Code Civil Annoté*, by Fuzier-Herman, vol. iii. p. 450).

⁶ Ord. Civ. Tit. XXII. Art. 12.

⁷ *Ibid.* Tit. XXXV.; and see Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 26.

⁸ *I.e.* the Ordinances of August 1539, and May 1579.

⁹ Title XX. of l'Ordonnance Civile (Des faits qui gisent en preuve vocale ou littéraire), Arts. 7 to 18 (inclusive). Subsequent ordinances on the same subject were issued in the reign of Louis XIV.—namely, in August 1683, in October 1691, in June 1705, in October 1706, and in July 1710.

¹⁰ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 25; Martin's *History of France*, 4th ed. vol. xiii. p. 80, note I.

Revolution, when it took place, still found the Register Books in the hands of the curés.¹

Owing to difficulties having arisen in the execution of the Ordonnance Civile, another, supplemental thereto, "pour la réformation de la justice, faisant la continuation de celle du mois d'Avril 1667," was issued.² Moreover, several edicts were also, at various times, registered, which form, as it were, appendices to the original Ordonnance Civile.³ Thus, by an Edict of August 1669, a new Court, called la Tournelle Civile, was attached to the Parlement de Paris, for the adjudication of cases in which the amount in dispute did not exceed a thousand écus,⁴ while another Edict, issued in 1673, not only reduced the fees payable to the judges, and curtailed the length of their vacations, but it also contained provisions for promoting and securing uniformity throughout France in certain legal forms then in use.⁵ Moreover, by an Edict of March 1673, the publicity of mortgages was prescribed, a measure which has been regarded as one of the wisest and most important introduced by Colbert in that which touches and concerns civil rights.⁶

In honour of the passing of l'Ordonnance Civile, several medals were struck, one of which represents Louis XIV. holding the scales of justice, in presence of a figure of Justice, and bears the legend "*Justitia judicanti*."⁷ Moreover, many learned works, by eminent jurists, were written to explain and interpret the Ordinance.⁸

Reference must now be made to another of the great codifying ordinances promoted by Colbert—namely, l'Ordonnance Criminelle of August 1670, which, when issued, became the French Code d'Instruction Criminelle⁹ for 120 years,¹⁰ and, together with l'Ordonnance Civile, which preceded it, forms part of one and the same design,¹¹ and was subjected to very similar preliminary labours and ordeals.¹² The Ordinance in question exhibits the same meritorious features as l'Ordonnance Civile, viz., order, clearness,

¹ Laurent's *Principes du Droit Civil Français*, 2nd ed. vol. ii. pp. 6 *et seq.*

² Isambert's *Recueil Général des Anciennes Loix Françaises*, vol. xviii. pp. 341 *et seq.* The Ordinance referred to in the text contained the following Articles—namely: I. Des Évocations; II. De règlements de juges en matière civile; III. De règlements de juges en matière criminelle; IV. Des committimus et gardes gardiennes; V. Des lettres d'État; and VI. Des Répits.

³ Martin's *History of France*, 4th ed. vol. xiii. pp. 79 *et seq.*

⁴ *Ibid.* pp. 79, 80. An écu, or crown, was worth about 4s. of our money.

⁵ *Ibid.* This useful measure, owing to the difficulties experienced in putting it into practice, was revoked in 1674 (*ibid.*).

⁶ *Ibid.* p. 80.

⁷ *Ibid.* p. 79.

⁸ *Recueil Général des Anciennes Loix Françaises*, by Isambert and others, vol. xviii. p. 104.

⁹ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. vi.

¹⁰ *Ibid.*

¹¹ *Ibid.* p. 206; and see *Les Anciennes Loix Françaises*, vol. xviii. p. 371.

¹² *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 206.

uniformity, and simplicity.¹ Unfortunately, however, it left untouched those baleful provisions of the Ordonnance de Villers-Cotterets of 1539, in regard to secret legal procedure,² and to the withholding from accused persons, in the majority of cases at least, of the professional aid afforded by trained advocates.³ Moreover, it also retained the barbarous practice (termed *la question*) for procuring confessions of guilt, and the disclosure of accomplices' names, from accused persons by the use of torture, where other measures failed.⁴ The retention of such objectionable provisions⁵ was in no small measure due to the arguments and influence of Colbert's uncle, Henri Pussort, which seem to have prevailed over the wiser and more humane arguments urged with great force and eloquence by Lamoignon, the First President of the Parlement de Paris,⁶ who, however, did succeed in introducing into the Ordinance many amendments and corrections,⁷ while, on the other hand, he seems to have resisted some useful reforms, and is known to have protested against any attempts to curtail judicial privileges and profits.⁸

In a memorandum, addressed by Colbert to Louis XIV., he defined, in the following words, the task of the Conseil de Justice in the sphere of penal legislation:

"Examiner tout ce qui concerna la justice criminelle du royaume, comme

¹ Martin's *History of France*, 4th ed. vol. xiii. p. 82. The Preamble of L'Ordonnance Criminelle is, in substance, as follows: "Les grands avantages que nos sujets ont reçus des soins que nous avons employés à réformer la procédure civile par nos ordonnances d'Avril, 1667, et d'Août 1669, nous ont porté à donner une pareille application au règlement de l'instruction criminelle qui est d'autant plus importante, que non seulement elle conserve les particuliers dans la possession paisible de leurs biens, ainsi que la civile; mais encore elle assure le repos public, et contient, par la crainte des châtimens, ceux qui ne sont pas retenus par la considération de leur devoir. A ces causes, etc." (Isambert, *Recueil Général des Anciennes Lois Françaises*, vol. xviii. pp. 371, 372).

² *Ibid.* The secret procedure referred to in the text existed in France long before 1539, when, however, resort thereto became general (*ibid.*).

³ *Ibid.* *Semble*, prisoners were allowed to have counsel only in non-capital cases (Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 33).

⁴ Tit. XIX. (Des jugemens et Procès-verbaux, de Question et Tortures; Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 33). This, and certain other objectionable, not to say barbarous, features of the Ordonnance Criminelle caused Voltaire to express the opinion that "Le Code Criminel est une preuve du mépris que des hommes qui se croient au-dessus des lois osent quelquefois montrer pour le peuple" (Voltaire's *Collected Works*, published in 1819, vol. xviii. p. 197, note 1). It is only fair to state that Art. 12 of Title XIX. of l'Ordonnance Criminelle provided that "Quelque nouvelle preuve qui survienne, l'accusé ne pourra être appliqué deux fois à la question pour un même fait."

⁵ The original author of these provisions is said to have been De Poyet, the Chancellor of 1539.

⁶ Martin's *History of France*, 4th ed. vol. xiii. p. 83; *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 188; *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 193.

⁷ *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 187.

⁸ *Ibid.*; and see *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, pp. 209, 210.

la plus importante, en retrancher toute la chicane, et prendre garde d'établir des moyens assurés pour, en conservant et assurant les innocents, parvenir promptement à la punition des criminels."¹

This was to be the aim of the Ordonnance Criminelle of 1670, which, however, it must be confessed, was not fully achieved, so that, of all the codifying ordinances issued in the reign of Louis XIV. and promoted by Colbert, this particular one has remained, upon the whole, the least bold, the least innovating, and the least praiseworthy.²

It is not proposed to discuss or examine in detail the provisions of the Ordonnance Criminelle, which, it may be mentioned, comprised twenty-eight Titles,³ and, without introducing a new procedure, regulated a system which had been gradually formed in France, and had also developed in neighbouring countries.⁴ The Ordinance did, however, reduce to precision the anterior law,⁵ and, in the conferences which took place while the Ordinance was still being discussed, care was taken by its framers, when a particular article suggested for adoption contained new matter, to direct special attention thereto.⁶ Nevertheless, the Ordonnance Criminelle was by no means a mere reproduction of a picture somewhat tarnished by age, for while it renovated the law in certain respects, and unfortunately added some new rigours to ancient severities,⁷ it did likewise somewhat modify the brutal scale of punishments till then in force, and also introduced some much-needed prison reforms.⁸ Moreover, while it adhered to fundamental principles, fixed by previous ordinances, it settled the details thereof, and, for the first time, presented a systematic exposition of criminal procedure,⁹ even condescending to the most minute particulars of the inquisitorial, written, and secret methods of such procedure.¹⁰ The Ordinance likewise sought to prevent future conflicts of the different magistrates amongst themselves, in regard to their respective jurisdictions over crimes and minor offences, by determining and defining, as far as possible, their respective spheres and powers.¹¹ Indeed, according to memoranda supplied by members of the Conseil d'État, prior to the drafting of the Ordinance under consideration, the reform of the magistracy, rather than of the law itself, was recommended, though the remodelling and modernising of the existing Ordinances were also suggested as being desir-

¹ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, p. 30; *Revue rétrospective*, 2nd series, vol. iv. p. 257.

² Martin's *History of France*, 4th ed. vol. xiii. p. 83.

³ *Ibid.* p. 81.

⁴ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, pp. vi, vii.

⁵ *Ibid.*

⁶ *Ibid.* p. vii.

⁷ *Ibid.*

⁸ *Cambridge Modern History*, vol. v. p. 15.

⁹ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. vii.

¹⁰ *Ibid.* The oral and public accusatory inquisition of the Middle Ages gradually became secret and inquisitorial (*ibid.*).

¹¹ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 30.

able.¹ This can hardly be wondered at, having regard to the scandalous appointments to the magisterial bench which, in the time of Colbert, were often made, vacancies thereon being sometimes filled by mere boys, fresh from college, who were invested with powers of life and death.²

In forming a critical judgment upon the *Ordonnance Criminelle* of 1670, it would be most unfair to compare it with modern criminal codes, or with existing penal legislation. It was the product of an age in which public opinion sanctioned what would now be regarded as cruel, not to say barbarous, methods of dealing with crimes and criminals. Draconian severity was then considered to be justifiable, in order to enforce obedience to the law. Whether Colbert himself was in favour of such a system may well be doubted. Probably he was far in advance of his time, and was content therefore to regard the *Ordonnance Criminelle*, not as a perfect code, but as a mere step in the right direction.

Though the two ordinances already referred to are commonly regarded as the principal ones registered during the reign of Louis XIV. and in the lifetime of Colbert, they are by no means the only important ones attributable to the latter's initiative and genius. Thus, even while the Civil and Criminal Ordinances, already examined, were in process of incubation, Colbert, surrounded by some twenty-one Commissioners, who, by diligent and searching investigations, extending over eight years, had made themselves acquainted with the necessary particulars and details, was preparing his magnificent scheme of legislative reform in the department of Waters, Woods, and Forests,³ which eventually took shape as "*L'Ordonnance des Eaux et Forêts*" of August 1669,⁴ has been designated a monument of legislative wisdom,⁵ and subsisted, almost intact, down to 1827.⁶ This Ordinance, by itself, would have sufficed to render any Minister producing it illustrious.⁷ It codified a multitude of confused and contradictory laws, which had survived from the remote times of Charlemagne, who himself attempted to organise the service of "*les eaux et forêts*,"⁸ in the hope of being able to check numerous invasions of, and encroachments upon, water and forest rights. Certainly there was ample justification for the issue

¹ *Histoire de la Procédure Criminelle en France*, by Adhémar Esmein, p. 185.

² *Ibid.* p. 182.

³ *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 37; *Martin's History of France*, 4th ed. vol. xiii. p. 90; Bachelet's *Les Grands Ministres Français*, tit. Colbert, p. 369; Isambert's *Recueil Général des Anciennes Lois Françaises*, vol. xviii. p. 219.

⁴ *Martin's History of France*, 4th ed. vol. xiii. p. 90.

⁵ *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 37.

⁶ *Ibid.*; and see *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iv. p. lxii.

⁷ *Martin's History of France*, 4th ed. vol. xiii. p. 90.

⁸ *Ibid.*; and see, generally, *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iv.

of the new Ordinance, mainly in order to preserve and protect forest rights, both public and private, and to prevent, in the interest of private individuals, commerce, and maritime requirements, the wanton destruction of timber trees.¹ Without attempting to reproduce the provisions of this Ordinance, which was of wide scope and vast importance to France, suffice it to state that it introduced uniformity of jurisprudence for all offences within its purview,² and that, besides legislating for woods and forests, properly so called, it also contained elaborate police regulations in regard to fishing in rivers, suppressed alleged rights of toll having no legal origin, controlled the exercise of sporting rights by various prescriptions, prohibited hunting in vineyards and in lands under cultivation, and abolished the death penalty for acts of poaching committed by peasants.³ That the Ordinance was largely intended to safeguard the interests of sea and river navigation is clearly indicated by its Preamble and by many of its articles.⁴ It has been said of this great Ordinance that it is one of those monuments of human skill and forethought in which order and reason are combined, and which, once overturned, cannot readily be replaced.⁵ Certainly the Code Forestier of 1827 does not seem to have been regarded as an improvement upon the Ordinance of 1669.⁶

Passing over certain Ordinances of minor importance, including one of August 1871, establishing uniformity of weights and measures in all the ports and arsenals of France, we come to another great Ordinance, namely, l'Ordonnance pour le Commerce of 1673.⁷ The object of this Ordinance is indicated by its Preamble in the following words: "Comme le Commerce est la source de l'abondance publique et la richesse des particuliers, nous avons depuis plusieurs années appliqué nos soins pour le rendre florissant dans notre royaume. C'est ce qui nous a porté premièrement à ériger parmi nos sujets plusieurs compagnies, par le moyen desquelles ils tirent présentement des pays les plus éloignés, ce qu'ils n'avaient auparavant que par l'entremise des autres nations. C'est ce qui nous a engagé ensuite à faire construire et armer grand nombre de vaisseaux pour l'avancement de la navigation, et à employer la force de nos armes par mer et par terre pour en maintenir la sûreté. Ces établissements ayant en tout le succès que nous

¹ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, pp. 37 et seq.; and see Martin's *History of France*, 4th ed. vol. xiii, pp. 90 et seq.

² *Ibid.*

³ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, *supra*, p. 39.

⁴ Martin's *History of France*, 4th ed. vol. xiii, p. 91. In 1681 Colbert wrote to the Intendant de Tours et Limoges, "Que rien n'est d'une plus grande utilité et n'apporte plus d'avantages aux peuples que la navigation des rivières" (*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iv. p. cxv).

⁵ Martin's *History of France*, 4th ed. vol. xiii. p. 92.

⁶ *Ibid.*

⁷ In connection with this Ordinance, reference should be made to the Edict of August 1669: "Portant que les gentilshommes pourront faire le commerce de mer sans déroger" (Isambert's *Recueil Général des Anciennes Loix Françaises*, vol. xviii. pp. 217 et seq.).

en attendions, nous avons cru être obligé de pourvoir à leur durée, par des réglemens capables d'assurer parmi les négociants la bonne foi contre la fraude, et de prévenir les obstacles qui les détournent de leur emploi, par la longueur des procès, et consommant en frais le plus liquide de ce qu'ils ont acquis."¹ This Ordinance, which embraces all that concerns commerce,² is believed to have been Colbert's favourite piece of legislation.³ It contains twelve Titles, and was considered to be, in all respects, worthy of the pains bestowed upon it by Colbert himself and by Savari, the great commercial specialist, author of a work once considered famous, called "Le Parfait Négociant,"⁴ published in 1675,⁵ who is said to have prepared the first draft of the Commercial Ordinance, which has, on this account, sometimes been called, after him, the Code Savari.⁶ Colbert was not, however, content to consult only one commercial specialist. On the contrary, he enlisted the services of the best-known French merchants of the day, and invited them to visit him, so that they might afford him trustworthy information and discuss amongst themselves, and with him, mercantile usages and law.⁷ He even lodged some of them under his own roof, and presented them to the King.⁸ The Ordinance under consideration was designed to free commercial men from needless anxiety in their profession, engendered by a variety of customs, to protect good faith from fraud, to establish uniform legislation in commercial cases, and to diminish the length and cost of litigation.⁹ It rendered interest upon interest illegal,¹⁰ and contained elaborate and minute provisions in regard to the conduct of mercantile affairs, and regulated the conduct of business by merchants, obliging them to practise book-keeping, to ascertain from day to day the state of their accounts, and also to make and preserve copies of all letters despatched, and to file those received.¹¹ Moreover, it likewise regulated the conditions of age and apprenticeship for those wishing

¹ Isambert's *Recueil Général des Anciennes Loix Françaises*, vol. xix. pp. 92, 93.

² *Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, p. 216.

³ *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 189.

⁴ Martin's *History of France*, 4th ed. vol. xiii. p. 152. He also wrote *Les Parères*, which was published in 1688 (*Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 189).

⁵ *Précis de l'Histoire du Droit Français*, by Paul Viollet, p. 189.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Martin's *History of France*, 4th ed. vol. xiii. p. 153; Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, p. 40. The twelve Titles into which the Ordinance is divided are as follows: I. Des Apprentis, Négociants, et Marchands, tant en gros qu'en détail; II. Des Agens de Banque et courtiers; III. Des Livres et Registres de Négociants, Marchands et Banquiers; IV. Des Sociétés; V. Des Lettres et Billets de change et promesses d'en fournir; VI. Des intérêts de change et du rechange; VII. De Contraintes par Corps; VIII. Des séparations de biens; IX. Des Défenses et Lettres de répit; X. Des Cessions de biens; XI. Des Faillites et Banqueroutes; XII. De la juridiction des Consuls (Isambert's *Recueil Général des Anciennes Loix Françaises*, vol. xix. pp. 93 to 107).

¹⁰ Tit. VI. *supra*.

¹¹ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 40; and see Tit. II. of the Ordinance.

to become merchants, providing that, for commercial purposes, minors should be regarded as of full age.¹ The same Ordinance also contained various provisions as to Companies or Partnerships,² which do not call for notice, and required that disputes amongst members thereof should be submitted to compulsory arbitration.³ Finally, in order to secure obedience to its provisions, the Ordinance rendered merchants failing to observe its more important provisions at least liable, in case of insolvency, to be declared fraudulent bankrupts and sentenced to death.⁴

L'Ordonnance de Commerce was, in 1680, followed by the Salt Tax (Gabelle) Ordinance, to which no further reference need, however, be made.

It was in August 1681 that the celebrated *Ordonnance pour la Marine* was issued, which was subsequently largely adopted by the English Admiralty.⁵ The elaboration of this Ordinance was confided to special Commissioners, to aid whom in their task Colbert appointed a *Maître des Requêtes* to visit all the ports of the kingdom.⁶ This Ordinance comprised, besides other matters too numerous to mention, all that concerns the duties of Admirals, the jurisdiction of Admiralty officials, the mode of procedure to be adopted in Admiralty cases, the prerogatives of Consuls in foreign countries, the organisation of French merchants, and of the navigation of the ports of the Levant, "en assemblée ou Nation."⁷ It also prescribed the conditions of capacity for employment of pilots and captains of ships, obliged ships making long voyages to carry chaplains and surgeons,⁸ regulated the policing of the coasts and of the seashores, introduced measures for saving life at sea, and provided for the infliction of the death penalty on those who robbed shipwrecked persons.⁹

Two years after Colbert's death was issued the last Ordinance with which his name is associated, and which was prepared during his ministry—namely, l'*Ordonnance Coloniale* of 1685, which is best known by its nickname of the "Code Noir."¹⁰

The responsibility, and the honour and credit, for the production of this Ordinance, which regulated the government of the French West Indian colonies and the condition and treatment of negro slaves and freedmen,¹¹ have been ascribed to Colbert's eldest son, the Marquis de Seignelai, though

¹ Tit. I. of the Ordinance; and see Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, *supra*, p. 40.

² See Tit. IV. of the Ordinance.

³ *Ibid.*

⁴ See Tit. XI. of the Ordinance; Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, p. 40.

⁵ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, *supra*, p. 42.

⁶ *Ibid.*, by Alfred Aymé, p. 42.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Clément's *Histoire de Colbert*, vol. ii. chap. xxviii. pp. 323, 324; Martin's *History of France*, 4th ed. vol. xiii. p. 555.

¹¹ Latham's *Dictionary of Names*, etc., p. 62; and see Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Pierre Clément, pp. 43 *et seq.*

it certainly was inspired by the great Colbert himself, whose spirit it breathes.¹

This Ordinance regulated generally the treatment of negroes in all the French colonies,² and established the obligations of masters towards their slaves, protecting the latter from oppression by exemplary punishments.³ It provided that negro slaves should be suitably clothed and fed, and also taken care of in time of sickness; that the murder of a black slave by his master should be the subject of criminal prosecution⁴; that negroes could marry and have families; that the husband and wife and children, though slaves, should not be sold separately; that the child of a slave husband and a free mother should follow the condition of the latter; and that all slaves should be baptized and instructed in the Catholic religion.⁵

Having regard to the terms of this Ordinance, which was certainly an improvement on the existing law,⁶ it scarcely seems to deserve the severe judgment passed upon it by Voltaire, who wrote that "le Code Noir n'a servi qu'à montrer que les gens de loi consultés par Louis XIV. n'avaient aucune idée des droits de l'humanité."⁷ That it remained operative until 1847, some months before the abolition of slavery in the French colonies, testifies to its intrinsic worth.⁸

In reviewing Colbert's work as a legislative reformer, it should always be remembered, to his credit, that he aimed at reducing the whole body of the ordinances of his country, by means of their codification, into as complete and uniform a system of jurisprudence as the Roman law itself became in the time, and thanks to the labours, of Justinian.⁹ Such being his ambition, Colbert naturally urged Louis XIV. not to be satisfied merely to reform the administration of justice, but to fulfil what is believed to have been the ambition of both Louis XI. and Henri IV.—namely, the bringing of the whole kingdom under the same law, "*même mesure et même poids.*"¹⁰ To have achieved such a result would probably have required thirty years of continuous peace, which Colbert's ambitious sovereign would not concede.¹¹ Nevertheless, much was undoubtedly accomplished, in the right direction, by the great codifying ordinances already referred to, which, however, in point

¹ Clément's *Histoire de Colbert*, vol. ii. chap. xxviii. p. 324. Colbert's eldest son only survived his father for seven years, dying November 3, 1690 (*Works of Voltaire*, published in 1819, vol. xvii. p. 35; *Lettres de Madame de Sévigné*, annotated edition, 1862, vol. iv. pp. 582, 583).

² *Manuel de Droit Français*, 9th ed., by Judge Pailliet, p. xxiv.

³ *Biographie Universelle, Ancienne et Moderne*, tit. Colbert, p. 216.

⁴ Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, *supra*, p. 44.

⁵ Martin's *History of France*, 4th ed. vol. xiii. p. 556.

⁶ *Ibid.*

⁷ Voltaire's *Collected Works*, ed. of 1819, vol. xviii. p. 197, note 1, where it is also stated, however, that "il y eut même une jurisprudence nouvelle établie en faveur des nègres de nos colonies, espèces d'homme qui n'avaient pas encore joui des droits de l'humanité."

⁸ Martin's *History of France*, 4th ed. vol. xiii. p. 556.

⁹ *Ibid.* p. 76.

¹⁰ *Ibid.* p. 77.

¹¹ *Ibid.*

of fact, represent "quelques fragments seulement de la pensée de Colbert sur l'unité des lois," though it is likewise true that "la France judiciaire a vécu de ses fragments jusqu'en 1789."¹

After Colbert's death in 1683, several ordinances were issued besides that termed the "Code Noir." Of these, he does not seem to have had any hand in their preparation, and, most probably, they were not even thought of till after his death. Neither was he in any way responsible for the Edict of 1863, which repealed the Edicts of Nantes and Nîmes.² This Edict, which is said to have been drawn up by the Chancellor Le Tellier shortly before his own death,³ seems to have been issued by the advice of Louvois, who, on Colbert's death, became the chief Minister of State.⁴ Colbert himself was very tolerant, both to Huguenots and Jews,⁵ and his eldest son, the Marquis de Seignelai, was also opposed to religious persecutions.⁶

In the reign of Louis XV., the great-grandson of the Grand Monarque, further codifying ordinances were, from time to time, registered. The credit for these has justly been ascribed to the Chancellor Aguesseau, reputed to have been the greatest lawyer of his age, just as, in the preceding reign of Louis XIV., the great ordinances issued were largely due to the inspiring genius and influence of Colbert.⁷

The ordinances of Louis XV. seem to have been prepared in much the same manner as those issued by his predecessor, and after consultation with persons possessing the necessary expert knowledge and skill.⁸ By means of these ordinances, that part of the civil law governing donations, wills, and substitutions was codified.⁹ The production of the Codes of the Consulate and Empire were also the result of most elaborate and laborious preparation.¹⁰

The French Civil Code (Code Napoléon), as it ultimately appeared, was not a new creation, and its compilers were disciples and not prophets,¹¹ but the Code actually issued was totally different from what was contemplated and intended by the men of the Revolution.¹² It is based on the Roman law, and was the first successful effort to give complete unity to law in France.¹³ A

¹ Martin's *History of France*, 4th ed. vol. xiii. p. 77.

² *Manuel de Droit Français*, 9th ed., by Judge Pailliet, p. xiv.

³ Martin's *History of France*, 4th ed. vol. xiv. p. 47.

⁴ *Lectures on Modern History*, by Lord Acton, p. 244; Martin's *History of France*, 4th ed. vol. xiv. pp. 39 *et seq.*

⁵ *Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. iii. part ii. p. xxii.

⁶ Martin's *History of France*, 4th ed. vol. xiv. p. 2.

⁷ *Cours élémentaire d'Histoire du Droit Français*, 2nd ed., by Adhémar Esmein, p. 785; *Le Code Civil, Livre du Centenaire*, p. 17.

⁸ *Le Code Civil, Livre du Centenaire*, p. 17. ⁹ *Ibid.*

¹⁰ *Ibid.*; and see *Cours élémentaire d'Histoire du Droit Français*, *supra*, p. 785.

¹¹ *Le Code Civil, Livre du Centenaire*, p. 5.

¹² *Ibid.*

¹³ *Studies in History and Jurisprudence*, by James Bryce, D.C.L., pp. 376, 377.

step so bold could hardly have been attempted except by an autocrat, and on the morrow of a Revolution.¹

The closing years of Colbert's life did not yield much happiness or contentment to the great statesman whose colossal administration of well-nigh twenty-two years' duration had accomplished so much for the good of his country in all departments of the public service, and notably, as has been seen,² in that of finance, which needed the exercise of the utmost skill, and the possession of supreme gifts by Colbert, in order to avert national bankruptcy, which appeared to be the almost inevitable consequence of Fouquet's previous mismanagement, extravagance, and dishonesty. For some time before his death Colbert was the victim of intrigues and accusations, skilfully contrived by Michel Le Tellier and his able but unscrupulous son François, or François-Michel, Marquis de Louvois,³ whose sinister influence over Louis XIV. was at first counterbalanced by that of Colbert and Lionne.⁴ No longer able to count upon the support and full confidence of the King, whom he had ever loved⁵ and faithfully served, hated by the people, who wrongly attributed to his prodigality the heavy taxation under which they groaned, and which was really due, amongst many other causes beyond ministerial control, to wars which Colbert opposed and Louvois advocated,⁶ and despised by the old aristocracy, who sneered at his comparatively humble origin,⁷ Colbert must indeed have felt that he who had "once trod the ways of glory" was, at the close of his life, discredited, if not actually disgraced.⁸

It was in Paris, at his residence in the Rue Neuve des Petits-champs, that Colbert breathed his last, on September 6, 1683, being then aged sixty-four.⁹ The disease which proved fatal to him was stated to have been stone.¹⁰ In his last illness his spiritual wants were attended to by that great Jesuit preacher Boudalouie, assisted by the Curé of St. Eustache, as parish priest.¹¹ When

¹ *Studies in History and Jurisprudence*, by James Bryce, D.C.L., pp. 376, 377.

² *Ante*, p. 65.

³ Martin's *History of France*, 4th ed. vol. xiii. p. 633.

⁴ *Lectures on Modern History*, by Lord Acton, p. 239.

⁵ Martin's *History of France*, 4th ed. vol. xiii. p. 633; *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 10.

⁶ "La lutte entre Colbert et Louvois était incessante; pendant la guerre, Colbert avait poussé à la paix; pendant la paix, Louvois poussait à la guerre" (Martin's *History of France*, 4th ed. vol. xiii. p. 545).

⁷ According to a contemporary epigram on Colbert—

"Colbert serait un gros drapier

Si chacun faisait son métier "

(*Lettres, Instructions et Mémoires de Colbert*, by Pierre Clément, vol. i. pp. 467 et seq.).

⁸ Martin's *History of France*, *supra*, vol. xiii. p. 633; *Colbert, Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 10.

⁹ Jal's *Dictionnaire de Biographie et d'Histoire*, p. 399; *Life of Famous John Baptist Colbert*, done into English in 1695, p. 233; *Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, p. 224.

¹⁰ Chalmers' *General Biographical Dictionary*, vol. v. p. 19.

¹¹ Martin's *History of France*, 4th ed. vol. xiii. p. 634.

near his end a letter from the King to his dying Minister was handed to Colbert, who exclaimed: "Je ne veux plus entendre parler du roi; qu'au moins il me laisse mourir tranquille. C'est au roi des Rois que j'ai maintenant à répondre"; likewise adding, "Si j'avais fait pour Dieu ce que j'ai fait pour cet homme-là, je serais sauvé dix fois, et maintenant je ne sais que je vais devenir"¹—words which recall the noble language attributed to Cardinal Wolsey after his fall, and with which every student of Shakespeare is perfectly familiar.²

Owing to the hostility of the people,³ whose ingratitude to Colbert was even greater than that of the King,⁴ who did show some signs of grief at his great Minister's death,⁵ it was deemed prudent to conduct the obsequies of Colbert with little or no publicity. He was accordingly, the day after his death, buried, at night,⁶ in the Church of St. Eustache, his remains being consigned to a tomb in the Chapel of St. Louis de Gonzague, which was the private property of the Colbert family.⁷ His wife, who only survived her husband for four years, erected to Colbert's memory a monument, executed from a design by Le Brun, which represents the great statesman, on his knees, reading out of a book, held open by an angel, and arrayed in the robes of the Order of the Saint-Esprit.⁸ At the foot of the monument are figures of Religion by Tubi, and Abundance by Coysevox.⁹ This was one of the monuments saved from destruction in 1792 by Lenoir, who had it removed to the Musée des Petits-Augustins, where it remained till 1801, when it was restored to St. Eustache.¹⁰

¹ Martin's *History of France*, 4th ed. vol. xiii. p. 634. To a Vicaire of St. Eustache, who told Colbert that the faithful would pray for his recovery, he replied, "No, not that; but let them pray God to have mercy on me" (Bachelet's *Les Grands Ministres Français*, tit. Colbert, p. 403). Probably the dying statesman felt then, like the great King Arthur, that

"More things are wrought by prayer
Than this world dreams of."—TENNYSON.

² See *Henry VIII.*, Act III. Scene ii. Wolsey's actual words are said to have been, "Had I but served my God as diligently as I have served my King, He would not have given me over in my grey hairs. But this is the just reward that I must receive for my diligent pains and study, not regarding my service to God, but only to my King."

³ It was feared that insult might be offered to Colbert's remains by the populace (Martin's *History of France*, *supra*, vol. xiii. p. 634; *Éloge de J.-B. Colbert*, 1783, p. 60; *Encyc. Brit.* 11th ed. vol. vi. p. 659).

⁴ Martin's *History of France*, *supra*, vol. xiii. p. 634; Colbert, *Promoteur des Grandes Ordonnances de Louis XIV.*, by Alfred Aymé, p. 10.

⁵ *Life and Times of Louis XIV.*, by G. P. R. James, vol. iv. p. 73.

⁶ Martin's *History of France*, *supra*, p. 634.

⁷ Jal's *Dictionnaire de Biographie et d'Histoire*, p. 399; *The Churches of Paris*, by S. S. Beale, p. 139.

⁸ *The Churches of Paris*, by S. S. Beale, p. 139.

⁹ *Ibid.*

¹⁰ *Ibid.* It appears that Colbert had two chapels erected at his own cost in the Church of St. Eustache, Paris, namely, one for marriages and the other for baptisms. These, together with the west front, were afterwards destroyed by fire, which accounts for the great disproportion between length and height which the Church now presents (*The Churches of Paris*, by S. S. Beale, p. 125).

So eminent a statesman and patriot as Colbert proved himself to be needs no grand tomb or epitaph to perpetuate his memory. Though not free from faults, which were largely the product of the corrupt age in which he lived, he will ever be remembered as one who desired the good of his nation as a whole, and who did not sacrifice one national force to benefit another.¹ In the pages of history he is still "le grand Colbert," of whom it has been truly said that "he accomplished for his country, to which he was sincerely devoted, not indeed all that he would, but all that he could."²

¹ Martin's *History of France*, 4th ed. vol. xiii. p. 35.

² See *Biographie Universelle, Ancienne et Moderne*, vol. ix. tit. Colbert, p. 224.

THE GREAT JURISTS OF THE WORLD. 7

XVI. JACQUES CUJAS.

[Contributed by COLEMAN PHILLIPSON, ESQ., M.A., LL.D., LITT.D.]

Law in France before Cujas.—Already in the eleventh century the wave of learning and culture was felt in France as well as in Italy. The curriculum of the university of Paris included legal instruction (that is, canon law, which however contained Roman elements), as well as theology and the arts. Through the influence of men like Abelard, as was pointed out in the preceding essay, Paris became the leading centre of scholasticism; and the scholastic method and spirit at once had a great effect both on the study of jurisprudence and on legal practice. Various compilations were made of the usages and customs of France; thus we find at the very beginning of the eleventh century a collection entitled *Assises de Jérusalem*. Numerous manuals and epitomes were also composed, incorporating a large body of Roman law; such were the *Decretum* and *Panormita* of Ivo of Chartres, the *Exceptiones Petri*, the *Brachylogus juris civilis*, and *Lo Codi*, all of which have previously been mentioned.¹ Two rival schools of law contributed much to the advance of jurisprudence, both native and Roman: one was that of Montpellier, which was greatly indebted to Placentinus, and established itself as the leading representative of law teaching in the “pays de droit écrit,” the other was that of Orleans, which was organised by Philip the Fair, and became the authoritative guide for legal exposition in the “pays de droit coutumier.” Besides, under the French monarchy jurisprudence was from early times applied to the affairs of government and the State. Philip Augustus (who in 1190 established royal courts of justice presided over by officers designated bailiffs or seneschals), St. Louis (who extended the organisation of parlements in the French provinces), and Philip the Fair gathered legists round them. With the gradual development of Roman doctrines, the influence of these lawyers rapidly increased; and they were entrusted by their sovereigns to draw up collections of ordinances—those “établissements” which were destined to undermine the feudal régime, and to restrain the advancing power of the papacy. The enlargement of the royal power and the spread of law-teaching

¹ Many observations which would have been necessary are omitted in the present essay, because its subject-matter is meant to be supplementary to, and not a repetition of, that set forth in the study on Alciati. The reader is once and for all referred thereto.

gave greater importance to the parlements, whose magistrates, being able jurisconsults, decided cases in accordance with the evidence brought, instead of by the obsolescent trial by battle. The *Établissements de Saint-Louis* (about 1270), drawn from that monarch's ordinances, from the customs of Touraine-Anjou and of the Orléanais, and also from the Corpus Juris of Justinian, established a great code of rules of civil and criminal procedure, and principles formulated from a large variety of legal decisions. In 1283 appeared the *Coutume de Beauvoisis*, compiled by Philippe de Rémi, sire de Beaumanoir. This work shows what a great influence Roman law exercised on the usages of North France, and how in the hands of the judge the rules of the ancient jurisprudence often triumphed when brought into conflict with Germanic conceptions. At about the same time were produced Durand's *Speculum juris* and Foucaud's two works on Roman law, viz. *Quaestiones juris* and *Recipiendarum actionum rationes*.

At the beginning of the fourteenth century, France possessed an original school of Romanistic legists, of whom the most prominent were Jacques de Revigny, Pierre de Belleperche, Guillaume de Cunéo, Petrus Jacobi, and Johannes Faber. They were professors and advocates at Orleans, Montpellier, or Toulouse, and became distinguished in Church and State. Their writings have an eminently practical character, and endeavoured to impart to the customary institutions and political organisation of their time a new vigour and vitality by ingrafting therein principles of Roman law. This aim is shown more particularly in the works of Faber—*Breviarium in Codicem* and *Commentarius ad Instituta*. Other practical manuals were issued, like G. du Breuil's *Stylus parlamenti*, which set forth the usages and formulae incidental to the procedure of the Royal Court of Justice. In the fifteenth century various projects were set on foot by Charles VII., Louis XI., and Charles VIII. Thus Charles VII. devoted himself to the reorganisation of French government, issued an ordinance (1453) for the reform of justice, and ordered the preparation of materials for a code. Similarly Charles VIII.'s ordinance (1493) provided for the amendment of judicial administration; and in his reign also compilations of local customs were made. In the meantime the Bartolist current was gaining ground in France, though it never penetrated as deeply as it had done in Italy. The French doctors were never addicted to the scholastic subtleties and vagaries as much as the Italians were. As a recent writer says: "L'esprit français est trop logique pour accepter sans résistance une création aussi bâtarde que celle des Bartolistes."¹ Nevertheless, in the decline of the study of jurisprudence during the fifteenth century, the influence of the Bartolists reached several schools in France, and predominated till the following century. Thus Forcadel, the rival of Cujas, largely owed to this circumstance his favour at Toulouse.²

¹ J. Flach, *Cujas, les Glossateurs et les Bartolistes*, in *Nouvelle revue historique de droit français et étranger* (Paris, 1883), vol. vii. pp. 205-27, at p. 2

² See further, *infra*,

The Sixteenth-Century Movement.—No century was more blemished than the sixteenth ; but no century achieved a more glorious distinction. At its opening, it found in the West (excluding Italy—as was shown in the previous essay) practically a mediaeval world ; at its close it witnessed a definitive transfiguration. Modernism, heralded by Renaissance and Reformation, came to displace once and for all old beliefs, old institutions, the old attitude to life and thought. The universal, more or less homogeneous consciousness of the West developed into the particular, individual consciousness of States—each working out, on its own lines, its own polity, its vernacular literature, its national religion, its native art. The Teutonic Renaissance was inaugurated, like the Latin, by an insurrection against the supremacy of scholastic Aristotelianism ; but its spirit was more democratic, more religious, more theological ; its bulwarks were St. Paul, representing Biblical authority, and St. Augustine, conducing to neo-Platonism, mystic philosophy. As to the Latin movement, the French Renaissance was distinguished from its progenitor, the Italian, in that it was more specifically educational, literary, and juristic, whilst the latter was more philosophical.¹ For a short time, however, the French Renaissance had assumed a distinctively Italian colour ; this was specially marked in the second quarter of the century, when there was so great an influx of Italians into France after the fall of Florence (1530), and the marriage of Francis I.'s second son to Catherine de' Medici. There was not always a clear line of demarcation between the Renaissance and the Reformation ; though on the whole it may be said that the first was of a more secular, the second of a more religious character. But in France the Reformation never became an entirely national movement. The Catholics constituted the great majority of the population, and detested the Protestants more for their schismatic and separatist attitude than for their heretical beliefs. This antagonism brought about over thirty years of religious wars, culminating in the massacre of St. Bartholomew—wars which had an injurious effect on the free intellectual work of scholars and jurists (most of whom were amongst the Reformers), and on French humanism in general.² France had just before then contributed a great deal to the classical and legal erudition of Europe. The Collège de France was supreme in classical philology, the university of Bourges was unrivalled in jurisprudence. French literature had received a great impulse and a fecundating force from humanism. There were eminent professors of Greek and masters of Latin who continued the great work of Budaeus ; e.g. Jacques Toussain (Tusanus), a favourite pupil of the latter, and Adrien Turnèbe (Turnebus), who issued Greek editions, translations, and commentaries on Latin authors ; Denys Lambin (Lambinus), whose Latin editions enjoyed great fame ; Jean Dorat (Auratus), the Aeschylean critic and inspirer of the Pléiade ; Marc Antoine Muret (Muretus), that

¹ Cf. Rev. A. M. Fairbairn, *Tendencies of European Thought in the Age of the Reformation*, in *Cambridge Modern History*, vol. ii. Chap. XIX.

² See *infra*, under life of Cujas.

master of Latinity who struggled against the superstition of Ciceronianism; Henri Estienne (Stephanus), who issued from his press a large number of Greek and Latin editions nearly all edited by him, and in his *Thesaurus Graecae Linguae* (1572) bequeathed a rich legacy to scholarship; Jacques Amyot, one of the few translators of genius, and an inspirer of the French spirit; Pierre Pithou, a man of versatile activity; Joseph Scaliger, the greatest name in the history of French classical learning; and finally Isaac Casaubon, whose aim was "to revive the picture of the ancient world." To these names may be added that of Pierre de la Ramée (Ramus), whose famous treatise on logic (*Dialecticae Institutiones*, Paris, 1543, translated into French 1555) was a reaction against Aristotelian authority, and was welcomed in Protestant universities (with the notable exception of Oxford).

As to humanist jurisprudence, though the real founder was Alciati, we may regard as a pioneer Pierre de l'Estoile (Stella), who began to lecture at Orleans in 1512. In France more than elsewhere was systematic opposition manifested to the subtleties and dogmatic methods of the Bartolists, and to the bewildering accumulation of glosses of their predecessors. Though the glossators merited, in some respects, more indulgence than their scholastic successors, men of the Renaissance like Rabelais treated them all alike with contempt. Thus Pantagruel says to the doctors of Paris: "Au cas que leur controverse était patente et facile à juger, vous l'avez obscurcie par sottises et déraisonnables raisons et ineptes opinions de Accurse, Balde, Bartole, de Castro . . . et ces aultres vieulx mastins qui jamais n'entendirent la moindre loy des Pandectes, et n'estoyent que gros veaulx de disme, ignorans de tout ce qui est nécessaire à l'intelligence des loix; car (comme il est tout certain), ils n'avoient cognoissance de langue ny grecque, ny latine. . . ." ¹ And comparing the glosses of the Accursians with the text of the Digest itself, he observes: "Au monde n'y a livres tant beaux, tant ornés, tant élégants comme sont les textes des Pandectes, mais la brodure d'iceux, c'est assavoir la glose d'Accurse est tant infâme, tant sale, tant punaise, que ce n'est qu'ordure et vilenie." ² Rabelais demanded that jurisprudence should be reinforced by humanist culture; he, like the others of the new school, maintained that philology, history, science in general are indispensable to a true juriscult. Similarly, Douaren, one of the most eminent of the humanist jurists, derided the Bartolists for their barbarous language, absence of method, and scholastic procedure; he complained that they gave themselves entirely to logic chopping and attacking the opinions of others rather than to seeking the truth in the sources themselves. Without devotion to letters, claimed he, no one could become either a jurist or a statesman, but only a cavilling pettifogger. ³ The bad Latin and wretched style of the post-glossators were attacked by formidable critics and consummate masters like Muret, who said their compositions were a hotchpotch ("farrago"), a confused mass ("acervus

¹ *Pantagruel* (1533), ii. c. 10.

² *Ibid.* ii. c. 5.

³ Cf. his letter to André Gaillard, in his *Opera* (Francofurti, 1592), p. 1100.

perturbatus”), a vile medley of barbarous, foreign, unheard-of expressions (“foedissimabarbararum, peregrinarum, inauditarum vocum colluvio”).¹ Other notable assailants of the “mos italicus” of the Bartolists were, besides Cujas himself, E. Baron,² F. Hotman,³ and Baudouin.⁴

The aim of the new French school of Romanists was, in the first place, to restore, by means of every collateral aid furnished by a thorough and comprehensive humanist culture, the true sources and texts of Roman jurisprudence, to indicate the original significance and applicability of its laws; secondly, to effect a synthesis and a coherent systematic structure of these re-established elements, and make manifest the spirit and philosophy of the entire body. This aim was not only part of the general revolt implied in the Renaissance, the revival of classical antiquity, but was also stimulated by the widely felt desire to remedy the abuses of judicial administration⁵; for it was felt that a more rational knowledge of Roman law would conduce to the amelioration of existing practice by introducing classical conceptions and principles. Noteworthy appeals on this ground were made in France by Hotman (*Antitribonianus*, 1567) and in Germany by that great reformer and accomplished humanist, Melanchthon (*Oratio de legibus*, Haguenau, 1530), and by Oldendorp (*Disputatio forensis de jure et aequitate*, Cologne, 1541). The latter emphatically insists that the reform of the administration of justice must begin by reforming the teaching of law.

The chief French representatives of the humanist method of jurisprudence issued critical editions of old or newly discovered texts; e.g. D. Godefroy (Gothofredus, 1549—1622), *Corpus juris civilis*; J. Godefroy (1582—1652, belongs to the sixteenth-century school more by the nature of his work than by date), *Quatuor fontes juris civilis* (ante-Justinian texts); J. du Tillet (d. 1570) and Cujas (1522—1590), *Theodosian Code*; P. Pithou (1539—1596), *Lex Dei*, and the post-Theodosian *novellae*; F. Pithou (1544—1621), Julian's *Epitome* and the laws of the Visigoths; J. du Tillet, Ulpian's *Regulae*; A. Bouchard, *Institutes* of Gaius and the *Sententiae* of Paul; E. Bonnefoi (Bonafidius, d. 1574), *Juris orientalis l. iii*; Cujas and A. Augustin, the *Basilica*; other sources of Graeco-Roman law were issued by Baudouin, Labbé, Bosquet, and others.⁶ Then there were other eminent French jurists of the century who did not devote themselves entirely to Roman law; e.g. Charles Du-

¹ *Oratio de doctoris officio deque modo jurisprudentiam studendi*.—His orations were published in 1576.

² *De ratione dicendi discendique juris civilis ad studiosam legum juventutem commonefactio* (1546).

³ *Jurisconsultus sive de optimo genere juris interpretandi*.

⁴ *De optima juris docendi discendique ratione*.

⁵ Cf. Flach, *loc. cit.* p. 221, n. (1): “La procédure était devenue en beaucoup de pays un vain simulacre qui ne servait qu'à éterniser les procès, à en rendre la solution arbitraire ou aléatoire, et le juge même instruit, laborieux et intègre, ne pouvait se reconnaître au milieu des commentaires amoncelés depuis des siècles.”

⁶ Cf. Brissaud, *op. cit.* vol. i. p. 357; A. Tardif, *Histoire des sources du droit français: Origines romaines* (Paris, 1890), p. 467.

moulin (1500—1566), surnamed by some of his contemporaries the “French Papinian”; F. Hotman (1524—1590); Douaren (1509—1559); Doneau (1527—1591), the great systematiser; Baudouin (1520—1573), eminent theologian as well as jurist; Ranconnet (d. 1559); Govéa (1505—1566); Connan (1508—1551), who began the general classification continued afterwards by Domat and other systematisers; B. Brisson (1531—1591), A. Le Conte (d. 1586), P. Faber (1540—1600), and others.¹ This assembly of names certainly gives France, with regard to sixteenth-century jurisprudence, the foremost place in the world²; and in this magnificent course Cujas stands out supreme.

Life of Cujas.³—Jacques Cujas (Jacobus Cujacius)—whose real name was Cujaus, which was changed for reasons of euphony—was born, the son of a fuller, in Toulouse, 1522. He first studied law in his native town under Arnaud Ferrier, who was a disciple of Alciati, and who subsequently attained high distinction as president of the Parlement of Paris, then French ambassador to the Council of Trent and to Venice, and afterwards as chancellor to the King of Navarre. Cujas, unlike Alciati, was fortunate in his first instructor; indeed, he ever after regarded him as the ablest professor he had known. At Toulouse he read all the known expounders of law, and frequently took part in public disputations with his fellow-pupils. But he applied himself also to the ancient languages, especially Greek, to history, rhetoric, philosophy, ethics, philology, and poetry. In 1547 he began a private course of lectures on the *Institutes*; and this venture was so successful that soon the sons of eminent men were sent to him from distant regions. Some seven years later he left Toulouse never to return, because, as it is averred, he failed in his application for a chair of Roman law. It is certain that he was a candidate, and that Forcadel, his Bartolist opponent, obtained the professorship in 1556. But it is doubtful whether Cujas took part in the actual test proposed by the authorities, as the records of the university for this epoch no longer exist.⁴ In any case Forcadel's selection was influenced by the fact that Toulouse was

¹ Cf. *infra*, on the relation between Cujas and his chief contemporaries.

² Cf. the opinion of the English civilian, Sir Arthur Duck, *De usu et autoritate juris civilis Romanorum* (London, 1653), l. ii. c. 5: “Jurisprudentia romana, si apud alias gentes extincta esset, apud solos Gallos repiriri posset.”

³ An adequate life of Cujas is greatly to be desired. The best account, short as it is, is still that of Berriat Saint-Prix, *Histoire du droit romain, suivie de l'histoire de Cujas* (1821), pp. 373-454, and notes, pp. 455-611.—The German translation of E. Spangenberg, *Jacob Cujas und seine Zeitgenossen* (Leipzig, 1822), contains a few additions and notes of not very great consequence; it is mainly useful for the convenient chronological list of Cujas' works.—Savigny's brief article in *Themis*, iv. (1822), pp. 194-207, gives a little supplementary matter.

⁴ Papyre Masson in his *Vie de Cujas*, written in the year of Cujas' death (1590), asserts that he really suffered defeat in the competition, and many others repeated this statement. This was denied in 1671 by Bernard Médon, in his *Histoire de Maran*, who maintained that the report was not in accordance with the university records, which, however, he did not quote. Berriat Saint-Prix accepts the traditional opinion.—For other references to this controversy, see Brissaud, *op. cit.* i. p. 350, n. 2.

still a stronghold of Bartolism, and that the majority of the students—who had a voice in the appointment—voted for him, owing to the persuasions of Jean Bodin (an adversary of Cujas), and to the long experience, good presence, and witty rhetorical speech of Forcadel. Gravina observes that in preferring the latter to Cujas the university preferred an ape to a man. After the departure of Cujas, one of his pupils, Jean Amariton, published the former's notes on Ulpian, and dedicated the work to him.

In November 1554 Cujas received a chair at the neighbouring town, Cahors, in succession to the Portuguese professor, Antoine de Govéa, who had spent nearly all his life in France, and established his position as a distinguished Romanist. About six months afterwards, however, Cujas was called to the university of Bourges (then pre-eminent for civil law—in Hotman's phrase, "le grand marché de la science") to fill the chair of Baudouin, who left for Germany owing to his religious opinions. This invitation was made by the Duchess of Berry, Marguerite of France, daughter of Francis I., on the advice of her chancellor, Michel de l'Hospital. She was, like her father, a patron of art and learning. Bourges then possessed several distinguished professors, *e.g.* Le Conte, a pupil of Alciati and editor of the *Corpus Juris*, Douaren, and Doneau, a great representative of the historical school. The two latter, seeing in Cujas a formidable rival, created all kinds of difficulties for him, and in his absence instigated the students against him; at their instance also Pulvaeus afterwards published a violent satire against him, to which his pupil Antoine Foquelin of Orleans replied. In spite of the support of Le Conte and the sympathy of his auditors (amongst whom were pupils like Pierre du Faur de Saint-Jory (P. Faber), Loysel, Pierre Ayrault, François Ragueau, Nicolas Cisner, and Pierre Pithou), he left Bourges in August 1557, and in November was called to Valence. During his stay at Bourges he had begun the publication of the great works—Notes on the Institutes and on Paul's *Sententiae*, Commentaries on certain titles of the Digest, and the *Observationes*,—which assured him the position of the leading jurist of the day, and procured him the friendship of eminent men like Etienne Pasquier. Several pupils accompanied him to Valence. At this time he married the daughter of a doctor of Avignon. He soon published a second edition of the above works, and issued a further portion of the Commentaries and the *Observationes*, of which the former was dedicated to Jean de Montluc, Bishop of Valence, whose friendship he enjoyed. His reputation was now so great that a legist, M. Vertranus Maurus, stated¹ that there was no need to quote passages from the writings of Cujas, as they were in everybody's hands.

In June 1559 Douaren died, and the Duchess of Berry recalled Cujas to Bourges, where he was generous enough to pronounce a eulogy on his late opponent. During the next few years further publications appeared, *e.g.* his commentaries on the last three books of the Code, on the title "De verborum obligationibus," which he dedicated to Marguerite and to L'Hospital. When

¹ *De jure liberorum* (Lugduni, 1558), c. 27.

the former became Duchess of Savoy, she and her husband were desirous of restoring to the university of Turin its former renown; and so, on the death of Antoine de Govéa (whom they had brought from Grenoble), they persuaded Cujas to accept the vacant chair (September 1566). During his residence in Italy, he paid visits to various universities to see the methods of teaching and to examine manuscripts; he tried unsuccessfully to obtain the loan of the famous Florentine manuscript of the Digest. It appears that Cujas was not able to habituate himself to the climate of Turin or to Italian manners; hence in August 1567 he returned to Valence university, which had greatly increased in importance by its union with the university of Grenoble. Very soon took place a general rising of Protestants, and Valence was seized; teaching was in consequence suspended until the conclusion of peace in the following year. On the resumption of his professional work, his fame was at its height, and his lectures were attended by large numbers of pupils, many of whom came from distant places abroad, notwithstanding the political and religious disturbances in France. Again in 1570 he was compelled to withdraw to Lyons, where he wrote new works and revised some of the old ones for new editions. He now received invitations from several other universities, *e.g.* Avignon, Besançon, and Bourges, but after the peace of St. Germain (in July) he was back in Valence. His students continued to increase in numbers, and amongst them were the prince of scholars, Joseph Scaliger, and one of the greatest of French historians, Jacques Auguste de Thou. In the autumn of 1571 he fell ill, but none the less continued his lectures, and begged the indulgence of his audience when he was carried into the lecture-room. On the fateful day of St. Bartholomew (August 24, 1572) he saved the life of Scaliger, and of his colleague, E. Bonnefoi. Later Charles IX. recognised the high position of Cujas by making him honorary councillor of the Parlement of Grenoble (May 1573).

In June 1575, hoping to obtain more tranquillity, he proceeded to Bourges, which was then almost entirely Catholic and was situated in a peaceful province. But he was not more fortunate there, and the civil dissension compelled him to remove to Paris. At the instance of the procureur-général of the King, the Parliament, by a decree of April 2, 1576, suspended in Cujas' favour the ordinances prohibiting the public teaching of civil law in the university, and even authorised him to confer degrees—"d'autant que le dit Cujas est, comme la cour sçait, personnage de grande et singulière doctrine et condition."¹ Some three months later, on the restoration of peace, he went back to Bourges, and never left it again. He was granted a pension by the Duc d'Alençon.

The greater part of the rest of his life was embittered by civil and religious disturbances, as well as by grief and sadness from other causes. In 1581 he lost his wife and only son, and for a time was overwhelmed with grief. He said in a letter that the friendship of Scaliger stayed his tears and saved him

¹ Cf. G. Périès, *La faculté de droit dans l'université de Paris*, p. 173. (Referred to by Brissaud, *op. cit.* i. p. 354.)

from a wretched grave. To another friend he wrote that he was pining to see him, that the sight of him would help to remove the sadness which was bearing him down in his loneliness. At this time offers reached him from Italy. Gregory XIII. himself wrote to him offering a large stipend and high honours if he accepted a professorship in Bologna ; but various circumstances induced him to remain in Bourges. He deeply felt the need of domestic companionship and of an heir ; and so, though over sixty years old, he married a young wife. But the only issue was a daughter (born in 1587). The following year he went to Paris to ask leave to retire, but Henry III. refused. The last two years of his life were still more troubled. After the assassination of the king (August 1, 1589), the leaguers proclaimed king, under the title of Charles X., the Cardinal de Bourbon, uncle of Henry IV. Cujas was asked, with promises of magnificent rewards, to write in favour of the Cardinal ; the promises were followed by threats, and fanatics in Bourges were roused against him. But nothing, not even a riot in which he nearly lost his life, could shake his refusal. Civil war continued, especially in Berry, and affected him deeply till his death, which took place on October 4, 1590, and was followed by a public funeral.

Like Alciati, Cujas led a restless, wandering life: the incessant disturbances and menacing circumstances of the time, together with the intriguing hostility of rival professors and of those adhering to the older schools, made it impossible for him to enjoy peace and tranquillity. This kind of life was then shared by many ardent spirits who ventured to strike out new paths for themselves. Amongst these we find—to mention only legists or publicists—men like Dumoulin, Baudouin, Doneau, and Hotman. After the massacre of St. Bartholomew, the position of professors in France who were suspected of heresy or of sympathy with the reform movement became still more intolerable. Ramus, assailed by the doctors of the Sorbonne, by the scholastic controversialists, and, after he turned Protestant, by the orthodox avengers, perished in the massacre. The classical critic and scholar, Lambinus, died of shock almost immediately after. Scaliger, like Doneau and Hotman, was compelled to seek a temporary refuge in Geneva. Cujas, however, did not assume such an uncompromising or decisive attitude towards religion. He perhaps belonged, with Erasmus and Montaigne, to that party which was characterised by a mild scepticism or by the broadest toleration, and detested fanaticism of any kind. This point of view was not due to lack of courage or vacillation ; when necessity arose, he was ready to risk his life rather than surrender his convictions to the seditious clamours of a threatening crowd of leaguers. He practised Catholicism, but it is significant that in his will he made no declaration in its favour, forbade the sale of his books to the Jesuits, and recommended his wife and daughter simply to abide by the precepts of the Holy Scripture. It was thought that he had openly embraced the reformed faith, for we find Hotman accusing him of deserting it again. However, in his discussions whenever legal matters were confronted

by religious arguments, he was wont to observe: "Nihil hoc ad edictum praetoris," and thus constantly emphasised that the spheres of law and religion were separate, affirmed the secular character of jurisprudence, and declared that it could no longer be the humble servant of theology.

Cujas does not appear to have possessed a marked professorial aptitude, in so far as secondary accomplishments are concerned. It is said that in his lectures his exordium was too precipitate, his general delivery rather rapid, his voice unequal; that he did not answer off-hand ("ex abrupto," as Alexander Scot, one of his pupils, says) the difficult questions put to him. He invariably avoided talking law at table or when he was in the society of his friends; and when they suggested problems to him he referred them to his lectures. There is no doubt that he lacked readiness of retort and rhetorical flourish, and other controversial attributes which were then so much appreciated; indeed, he seems to have had a deep contempt for the art of declamation, and forensic eloquence without true insight and deep knowledge he disdained above all. He carefully prepared his public discourses, which were always characterised by lucid exposition, exact and penetrating analysis. Under his scrutiny, backed up as it was by scientific method, immense erudition, and new suggestive ideas, the most obscure passages yielded their meaning. He always took a personal interest in his students, and they were attached to him. He admitted them to his table and to his library, and often helped them pecuniarily. Before and after lectures they formed a procession and escorted him to and from his house. Many accompanied him in his frequent peregrinations, and when they left him still kept up the most friendly relations.

Works¹ and their Character.—The works of Cujas, like those of Alciati, do not set forth an elaborate, systematic account of Roman jurisprudence as a whole. The time was not yet ripe for such an undertaking. But Cujas, more than any other single investigator, contributed to the realisation of this object. His voluminous publications—a magnificent array of mighty tomes—were nearly all devoted to the exegetic study of the sources. The most important of these writings are the Commentaries on Papinian (issued after his death), and above all the *Observationum et emendationum libri XXVIII*, which, originally designed to extend to forty books, appeared at intervals from 1556 to his death, except the last four books posthumously published by Pithou. The latter work, described by eminent Romanists like Heineccius as an "opus incomparabile," an "opus divinum," presents with but little order a rich harvest of restorations of texts or suggestive conjectures, of corrections and interpretations. Other writings, representing for the most part the sub-

¹ The collected works were edited by C. A. Fabrot—*Opera Omnia*, 10 vols., folio, (Paris, 1658). There is also an eleventh volume under the title of Appendix, which contains, besides other matter, his *Notata Antonii Mercatoris*.—The editions of Naples (1722-7) and Venice (1758-83) in 11 vols. are practically mere reprints; but they are more convenient, as there is an index to them, entitled *Promptuarium operum Jac. Cujacii*, 2 vols. 1763 (2nd ed. 1795).

stance of his lectures, like the *Tractatus ad Africanum*, and the *Recitationes sollemnes* on Paul, Ulpian, Modestinus, Marcellus, Julian, Scaevola, and others, seek to re-establish in their original form and restore to their original meaning the contributions of the classical jurisconsults comprised in the Justinian compilations. His *Paratitla* on the Digest—a small book which his opponent Hotman advised his son always to carry about with him—offers a concise exposition of the titles of that collection. He also issued learned and considerably amended editions of texts which had before been published with greater or lesser defects, and, what is much more noteworthy, he gave to the world for the first time numerous texts based on collated manuscripts, which he searched out in every promising quarter. In addition to these writings on Roman law, we find in his volumes a few inaugural discourses, which academic duties demanded of him, two polemical compositions (the *Notata Antonii Mercatoris*, i.e. written under the pseudonym of “Antonius Mercator,” and the defence of Bishop Montluc against the attack of Doneau), also a work relating to feudal law (Treatise on Fiefs), and one on ecclesiastical law (a commentary on three books of the Decretals of Pope Gregory IX.). As for the important constituents of French national law, viz. customs, royal ordinances, judgments and orders of the parlements, he did not make any of them the subject of a separate work, but he utilised his knowledge of them in the illustrations and comparisons which enrich his works, and necessarily so in his professional consultations.

In consideration of the manuscripts discovered or published by Cujas, he occupies the foremost place in the history of Roman law. His zeal in the search of these documents was inexhaustible. To procure them he spared no toil, no expense. One of the chief reasons for his going to Italy was to examine manuscripts. In 1571 he made a journey to Provence for the same purpose. In the preceding year he kept several persons occupied in the like quest; in 1572 he obtained the services of a friend in Italy to make investigations; in 1575 a nobleman came expressly from Padua to Bourges with a collection of *Sententiae* of the ancient jurisconsults. All this indefatigable enthusiasm was not that of a bibliomaniac, but that of a true explorer and scholar; he was indeed ever ready to lend his precious acquisitions to students who might desire to consult them, and gave some to friends and publishers, and lost many which had been temporarily borrowed and never returned.¹ It appears from a catalogue drawn up by one of his pupils, about 1574, that there were some two hundred manuscripts in his library; and according to a later list, copied from an inventory made after his death and published quite recently,² there were actually about four hundred. And these numerous documents of his own were but a small part of those he consulted during his literary labours. The greater portion of his correspondence is concerned with this subject.

¹ Cf. B. Saint-Prix, *op. cit.* pp. 421-2.

² Cf. M. Omont, in *Nouvelle revue historique de droit*, 1885, pp. 233-7; and 1888, pp. 632-41.

The manuscripts of which he took cognisance and of which many are no longer extant related to the three periods of Roman jurisprudence—ante-Justinian, Justinian, and post-Justinian. For example, he published in 1566 the *Lex Romana Burgundionum*, probably after a manuscript belonging to Pierre Pithou, but he was mistaken in considering it the work of a jurist named Papian.¹ He also issued for the first time the *Consultatio veteris jurisconsulti*, after a manuscript now lost, of which fragments appeared in 1564 and 1566, then the text itself in 1577, and more completely in 1586. This was prefixed to his collection of sixty consultations; and in his dedicatory epistle he says he did not himself discover the manuscript, but that his knowledge of it was due to Antoine Loysel. The book *De asse et ponderibus*, attributed generally to Volusius Moecianus, a jurisconsult of the time of Antoninus Pius, though held by others to have been written after the Theodosian Code (438), was published for the first time by Cujas in 1586, together with various other texts of ante-Justinian law. He was the first to issue Books VI. to VIII. of the Theodosian Code, after the Charpin manuscript; and this work, incomplete though it was, proved of great assistance to Jacques Godefroy in the preparation of his superior edition, which appeared, several years after his death, in 1665. Modern students are indebted to him for numerous portions of Paul's *Sententiae* presented (1585) in Book XXI. of his *Observationes*, and taken from the Besançon manuscript. Of the post-Justinian collections, he was the first to bring to light many books of the *Basilica*, for which he consulted more complete manuscripts than those now in existence, e.g. those which were in the library of Catherine de' Medici, and others acquired by himself during his stay in Italy.² His labours were afterwards utilised for the great edition of the *Basilica* published by Fabrot. As for the Justinian compilations themselves, he did much towards the restoration of the Code; and nearly all the Greek constitutions were re-established by him and by Antonius Augustinus. He also revised, by collating old manuscripts, the text of the Institutes, and brought out an edition in 1585. Further, in many cases Cujas offered encouragement and counsel to other researchers in their handling of juristic documents: thus Julian's *Epitome* (already published several times in the sixteenth century) was issued by the brothers Pithou, by his advice and under his patronage; and Le Conte's edition of the *Novellae* was revised by him. Finally, he sometimes supplied valuable materials even for non-legal publications: thus to him was mainly due the Latin translation of the letters of the ancient Greeks found in the library of Pierre Pithou, and published at Geneva, 1606.

The style of Cujas is marked by extreme concision, which makes the reading of his works difficult to all but students of experience; apart from this striking quality we find an elegance of language, a clearness of expression,

¹ See the title of his edition of 1586: *Burgundionis jurisconsulti, qui Papiani respondentur titulum praefert, liber.*

² Cf. the letter of Cujas, dated August 7, 1567, to be found in *Themis*, i. p. 94.

and rational sequence in the argument, backed up by apt citations, comparisons, and a controlled erudition, all of which combine to distinguish his diction and his whole manner from the dull, heavy, un-Roman Latin of the majority of his contemporaries, especially of the jurists. He does not possess the power of felicitous construction and classical propriety of a Muret ; but his prose is certainly a very effective medium for conducting critical investigation with force, directness, and precision.

Method of Cujas.—Alciati was the principal founder of the humanist school of jurisprudence ; but in his time his ideas and methods were accepted by a very small minority, and opposed by a multitude of formidable adversaries attached to old ways and conceptions. With the coming of Cujas the new method was once and for all established, opposition was gradually overcome, and unanimity secured amongst most of the enlightened and unprejudiced students. The course of the new school, more or less undecided before, was now definitively determined ; its aim was marked out with greater precision. Before the Bartolist adherents might well have maintained their authority, perhaps they might with some success have re-asserted their pre-eminence ; now their methods were shown to be hopelessly bad and their point of view fallacious. The work of Cujas, more than that of any other jurist of the time, conduced to the repudiation of the earlier juristic heritage, and brought about the triumphant victory of the historical school. As a humanist he was well versed in the classical literature, and used this knowledge with remarkable efficacy in the comparison of legal and historical texts with the purely literary. He laicised the study of law. He liberated it from the custom of heaping up commentaries on isolated enactments, and from that of spinning out scholastic subtleties and endless artificial distinctions. Accursius and the glossators, however, he held in far less disesteem than Bartolus and the commentators with their futile “fictions and ill imaginings.”¹ Of the latter he tersely—and truly—observes: “Verbosi in re facili, in difficili muti, in angusta diffusi,”² whilst Accursius he places high amongst juristic interpreters.³ His main reason for holding the glossators in higher favour is that they had made an effort to examine the texts. He incessantly urged his students to study the sources, rather than the verbose and obscure commentaries of the doctors.⁴ Similarly, in his endeavours to make of law a rational science, he assailed the ignorant practitioners and their accredited decisions in the courts—decisions based on prejudice, personal considerations, narrow views, erroneous conceptions, shifting fundamentals. No doubt he held theory in higher regard than practice—and necessarily so, in view of the nature of his work and the circumstances of the time ; but he by no means despised

¹ *Observationum*, xii. c. 16: “. . . Accursium longe magis corona donaverim, a quo quidquid aberrat Bartolus, vanæ fictiones et ægri somnia videntur.”

² *Respons. Papin.*, lib. v. leg. 17 (*De injusto rupto*).

³ *Observat.* iii. c. 11: “Accursius noster, quem ego et Latinis et Graecis omnibus interpretibus iuris facile antepono . . .”

⁴ *Oratio de ratione docendi juris*.

practice, as his consultations show.¹ As to his immediate predecessor Alciati, whilst recognising the indisputable merit of the Italian jurist in having been the first to apply systematically the historical and comparative method to juristic investigations, Cujas none the less holds that he was only a mediocre interpreter, inexact in his citations, incomplete and superficial in his exegetic expositions.²

The method of Cujas, then, is comparative, critical, historical. The constituent elements of Roman jurisprudence—as represented, for example, in the Justinian compilation—are derived from various sources which were afterwards lost; and the only guidance we have as to its intrinsic composition is solely an indication of the place those elements occupied in the original works. Hence the study of the ancient civil law may be approached in three ways: firstly, by accepting the classification so found, making the best of it, and pointing out how discovered defects might have been avoided by a prior modification of the plan; or secondly, by disregarding the original sequence of the subject-matter, and substituting therefor an arbitrary order, more general, coherent, and logical; or thirdly, by restoring, as far as is possible, the indicated sources in the light of every suggestion obtained from the original materials, and by the aid of conceptions and results furnished by cognate subjects. The first method of procedure would give best the legislation of Justinian in its purely juridical aspect; the second is more in accordance with the exigencies of universal reason, and would present the legislative product in its philosophical significance; the third is the historic method, and would set forth, with regard to time, place, and circumstance, the intrinsic sense and relative force of the respective elements composing the whole. This latter method was that of Cujas and the new school.³ In his hands, therefore, the *Corpus Juris* was not treated as a homogeneous body of laws (for such it had been frequently assumed before him), but a complex mass which could not well be understood without decomposing it again and examining all its parts. It was his bold design to re-create what Tribonian, that versatile and remarkable minister of Justinian, had altered or consigned to oblivion, to restore the purity of Roman traditions which had been adulterated by the pretentious barbarism of Byzantium, to resuscitate the work of the classical jurisconsults by uniting scattered fragments, to set forth the very principles of Roman jurisprudence as they had been in the minds of those who conceived them, to show the magnificent Roman heritage in its most favourable, that is, in its true, light. Cujas brought to bear on his work the disinterested judicial view of an historian, the imagination of a creative artist, and the exact learning of a scholar. Whenever he proposed a new interpretation, he did not fail to refute or criticise the one previously accepted; and he

¹ See, for example, his 23rd consultation.

² Cf. *Notata Antonii Mercatoris*, ii. c. 29.

³ Cf. L. Cabantous, in *Revue de législation et de jurisprudence* (Paris), vol. x. (1839) pp. 32 et seq.

showed that his method, applied by one who possessed a mastery over details and a dispassionate judgment, would demolish the false and confirm the true. In pursuance of his design he inquired into and annotated the *Regulae* of Ulpian, the *Sententiae* of Paul; he wrote a commentary on Africanus; and restored the work of Papinian, that profound legal genius and victim of Caracalla. This supreme jurist's works had reached us only in mutilated fragments; but Cujas applied himself to these sacred remains, and with diligence and penetration brought them to life, and extracted their secret, hitherto unascertained. In the fragments of the contributors to the Justinian compilation, he saw more than groups of legal dispositions conceived in a restricted sense and adopted fortuitously; he recognised that these colourless fragments represented a certain crystallisation of the past, and in his handling of them the past was made to live again. He took the isolated texts, restored them with felicitous effect, replaced them in the work of the respective juriconsults, set the latter in their respective schools, and the schools in their particular epochs. It is noteworthy that the great Romanists of the seventeenth and even of the eighteenth century did not adopt this exacting method; thus jurists like Vinnius, Voet, Heineccius, Pothier generally adhered to the defective order of the various compilations of Justinian, and others like Domat adopted, in conformity with the project of Leibnitz, a somewhat arbitrary classification based on ideas foreign to the classical juriconsults.

Before the sixteenth century attempts were made to explain texts, but legal interpretation, ill-proportioned, unsystematic as it was, had not yet risen to the dignity of a science, which necessarily implies a complete methodical body of doctrines embracing facts classified according to certain determinate principles, which are controlled by constant reference to these facts, and which govern the doctrines set forth. By consistently applying philology, history, antiquarian lore to the examination of texts, Cujas founded a method which proved an instrument of the greatest efficiency, and from which posterity has derived the most fruitful results. It was not his aim, however, to create a general systematic structure of the entire body of Roman jurisprudence; such exposition was reserved for successors, who were able to benefit by his pioneer work. His genius was essentially critical, analytic; he did not possess in an equal degree that philosophical power which enables one to generalise on broad lines, and co-ordinate separate parts—the results of analytic investigation—into an all-comprehensive unity.

To conclude this brief statement of Cujas' method and point of view, it will perhaps be of interest to give one or two of his specific opinions on the different parts of Justinian's compilation, and on various legal manuscripts and editions. He appears to have approved of the general plan and structure of the Institutes; he thought it was unnecessary to make long commentaries on the work, that it was best to confine oneself to such brief notes as would effect a restoration of the passages altered by time or by the carelessness of the

copyists and publishers, and that the best way to study it is by a comparison with the paraphrase of Theophilus.¹ With regard to the relation of the Institutes to the other portions of the Justinian law, he observes that many passages of the Digest and the Code can be cleared up by the application of facts, dispositions, and principles enunciated in the former, and supports his contention by giving a large number of examples.² He prefers the Greek text of the *Novels* to the Latin translation known as *Vulgata* or *Authentica*, but favours this translation more than those published in his day by G. Meltzer (Haloander, 1501-31) and others—perhaps because the earlier version is more literal and was the one used by the glossators and accepted in the courts.³ The *Novels* of Leo he refers to merely to throw light on the obscure passages of the Digest, Code, or Institutes. In the fine edition of the Florentine Pandects by Taurellus (1553), Cujas detected various matters which needed emendation, though he recognised the high merit of the work; he was anxious to make good the defects, but he failed to obtain the loan of the jealously guarded manuscripts. He maintained—and his view is shared by Savigny—that amongst the existing manuscripts of the Digest several are copies of earlier manuscripts other than the Florentine, and that all ought to be collated and examined with a view to establishing the best text⁴; and in conformity with this opinion he effected large restorations, especially in the last ten laws of the title “De interdictis et relegatis” which were wanting in the Florentine manuscript.⁵

Relation of Cujas to his Contemporaries.—Some of the distinguished pupils and contemporaries of Cujas have already been mentioned above; and some of the Romanists and other jurists belonging to his school have been indicated. To the latter may be added the German legist and philologist, Hubertus Giphanius (Giffen, 1534—1616), and, in the Netherlands, Viglius Zuichemus (1507—1577), the first editor of the paraphrase of Theophilus. In some quarters the methods of Cujas met with strong opposition—for it is to be remembered that the Roman law found a hardy opponent in the customary law, which had powerful adherents and advocates. The old maxim, “coutume passe droit” (*i.e.* Roman law), was often emphasised. Indeed, in the university of Paris the teaching of the civil law had by ordinance been for a considerable time forbidden, and, as we have seen, it was partially revived by way of a special favour to Cujas. Among his notable adversaries were his own countrymen, Douaren and Doneau, Dumoulin and Hotman. The vigorous controversies that took place show the novelty of Cujas’ doctrine and their historical significance.

François Douaren (Duarenus), a pupil of Alciati, was born in 1509 and died in 1559 at Bourges, where he had been a professor after having practised at

¹ *Observat.* xi. c. 34.

² *Ibid.* xi. c. 38

³ *Ibid.* viii. c. 40.

⁴ *Ibid.* i. c. 1; ii. c. 1.

Opera, vol. x. p. 286.

the bar, and manifested much hostility to Cujas. He had also conflicts with Baudouin and Baron. Like his master Alciati, he united the study of letters to that of law. His works, the chief of which is the Commentary on the Digest, are written in an elegant classical style, and were highly esteemed by his great rival. He attached greater importance than Cujas did to forensic practice. His poignant criticism of the Bartolists and their methods has already been referred to. He was among the first to purge legal science from the barbarous importations of predecessors. He had associated himself to Calvin, and his *De sacris ministeriis* breathes a spirit of religious liberty.

Hugues Doneau (Donellus, 1527—1591), a pupil of the preceding, was first a professor at Bourges, then, on account of his religious opinions, fled from France in disguise, and resided successively at Geneva, Heidelberg, Leyden, and finally at Altdorf, where he died. He was the most eminent constructive jurist of the century. Unlike Cujas, he did not inquire into the historical connection of laws, and search out what the Roman juriconsults and legislators meant when the laws were first propounded; for him the question was the actual significance of the texts, and what they implied when they were incorporated into the compilation of Justinian. Thus Doneau was more strictly a lawyer, whereas Cujas was also, and deliberately so, an historian. For Doneau Roman law was only law, a constant guide in civil and political society; for Cujas it was also a precious fragment of antiquity. For Doneau it was to be handled systematically, geometrically, as a finished product; for Cujas it was to be treated comparatively as a changing organism. And so Doneau presented a dogmatic treatise, Cujas produced commentaries, annotations, purged texts. Doneau rehandled the subject-matter of this or that title, set it forth in a new order, and bound together the diverse elements. He systematically advanced definitions, laid down principles, and logically deduced conclusions. In this syllogistic procedure he sometimes resorted to the dialectic artifices and scholastic distinctions, and was particularly fond of using the dilemma. He was, however, a humanist and not a Bartolist. In his style, markedly inferior to that of Cujas, he preferred simplicity to elegance; and he condemned that excessive conciseness of some jurists which was often productive of obscurity. In Germany above all his methodical exposition of Roman law, the *Commentarii juris civilis*, acquired a great reputation, and became the model for numerous treatises of the same character.

François Hotman (Hotomannus, born in Paris 1524, died in Basle 1590), whose father, Pierre, was councillor in the Parlement of Paris, studied law in Orleans, then practised at the bar, and afterwards lectured in Paris. He became a Protestant, fled to Switzerland, taught at Lausanne, then (1555) at Strasburg, where he found Baudouin exiled also for religious reasons. He soon acquired a great reputation, obtained help from Germany for his French co-religionists, returned to his country, taught at Valence (1563-6),

then replaced Cujas at Bourges. The massacre of St. Bartholomew finally drove him (like Doneau) from his country. Henceforth he remained in Switzerland, and died at Basle, overwhelmed with sickness and misery, but to the last full of fortitude. Hotman applied to the study of law not so much history proper as archaeology and philosophy.¹ He was mainly concerned with interpretation, and adduced examples from classical authors. He made no attempt at generalisation, or at constructing a systematic treatise. Apart from works on Roman jurisprudence, he wrote on feudal law, and on the public law of France, e.g. *De jure regni Franciæ*, and *Franco-Gallia*, in the latter of which he discussed the ancient constitution of France, and was among the first to insist on the idea of the sovereignty of nations. In his *Antitribonian*, published in French (1567), he pleaded for unity of legislation, and for a union of practice—which had been to some extent hindered by the antagonism between the Bartolists and the humanists²—with the historical and synthetic treatment of law. He showed that the new direction taken by the study of Roman law must result in the revision of French national law. He demanded a code, which was to embody the most valuable portions of the Roman jurisprudence, and whatever was found good in other sources ; and he insisted on the claims of the vernacular language as a medium for legal publication. Unlike Cujas, he was not an ardent worshipper of the ancient legal system ; he even doubted if its study in France would be productive of good.

François Baudouin (Balduinus, born at Arras 1520, died 1573), after studying at Louvain, became secretary to Dumoulin, gave a free course of lectures in Paris (1546), and then was professor successively at Bourges, Strasburg, Heidelberg, Paris, Angers. He was a friend of Calvin and Bucer ; but he does not seem to have definitively embraced Protestantism. He practised Catholicism in France, Lutheranism in Germany, and Calvinism in Switzerland, and finally retracted his heterodox opinions. Just as Cujas refused to defend the conduct of the leaguers, so Baudouin refused to justify the French Court for the massacre of St. Bartholomew. Like Cujas, he was for tolerance and individual liberty of conscience as against outward form and symbol, and repudiated extreme violence and schism. He belongs to the historical school of law, and emphasised the importance of history as vigorously as Cujas did : jurisprudence, he said, is blind without history (“Sine historia caecam esse jurisprudentiam”). Unlike Cujas, however, he often concerned himself with historical disquisition as an end, and not as ancillary to the development of legal doctrine. Thus, he usually chose such subjects as lent themselves best to historical treatment. He tried to trace the origin of Roman law. In his account of the Twelve Tables he constantly asked himself why the provisions were conceived in this sense rather than in that. When he took up the Novels of Justinian it was only to discuss the modifications therein introduced

¹ Cf. his *Institutiones dialecticæ ex fontibus philosophorum*.

² *Antitribonian*, c. xv.

by the legislator, and how these were demanded by the changing circumstances of the time.¹

Charles Dumoulin (born in Paris 1500, died there 1566) studied law at Orleans and Poitiers, then went to the bar in Paris, but was not successful. He embraced Calvinism; and owing to civil dissensions was obliged to leave Paris, and then taught law at Strasburg and Besançon. He returned to his native town in 1557. Like most of the jurists, he proved himself an able religious controversialist. He published violent treatises against papal authority. He appealed to jurisprudence as a palliative in the incessant theological and political disputes of the time. He insisted on a combination of law with public affairs and forensic practice. He had a leaning towards the Bartolist methods, and seems to have had some esteem for Forcadel, the inept rival of Cujas and facetious adorer of Bartolus. Besides his notable work on the customary law of Paris, he wrote on feudal law (*De feudis*) and on other subjects. His works show ample learning and dialectic subtlety, but are written in a difficult and unpleasant style. He brought together and investigated a large body of French customs and usages, indicated a basis for more unified and consistent French legislation, and declared himself an enemy of feudalism. He did for French law what Cujas did for Roman law. In his commentary on the custom of Paris, he disengaged the fundamental principles of French law; and by his systematisation of the customary law he in a large measure prepared the way for the work of Pothier and for the Civil Code. Some of his contemporaries called him the prince of jurisconsults, to which he all too readily subscribed; it was his proud boast that he yielded to no one and could be taught by no one.

In the polemical discussions in which Cujas and the foregoing jurists were involved, a good deal of bitterness, invective, satire, gross insult was imported. "Les grands jurisconsultes de cette époque," says M. Brissaud, "s'injuriaient à la façon des héros d'Homère."² In this age personal abuse accompanied, and often replaced, argument. Thus Hotman, in his attack on Cujas, reproached him for returning to Catholicism after having joined the reformers, said that he would blot out from all his books the name of the apostate, and calumniously described him as "temulentus," "lutulentus," "turbulentus" (drunk, dirty, turbulent). He was even more severe with Baudouin. Similarly Doneau made use of ridiculous vituperation and false charges. Lesser men like Fournier and Jean Robert, professor at Orleans, likewise wrote insultingly of Cujas' person, and made captious and malignant attacks on his method and doctrines. On the other hand, Cujas did not disdain to reply—and with no great moderation—to such

¹ Cf. his *Scaevola seu Jurisprudentia Muciana; De institutione historiae universalis et ejus cum jurisprudentia conjunctione*, etc. (These and others are to be found in the collection of Heineccius, *Jurisprudentia romana et attica*, vol. i. Leyden, 1738.)

² *Op. cit.* i. p. 354.

pamphleteering abuse, and even descended to making trivial anagrams¹ from the names of opponents unworthy of his steel. But in all these conflicts he was rarely the aggressor. He appears to have been extremely sensitive to criticism, and never forgave Mériille for compiling a list of his inconsistent statements. (It were a miracle indeed to find none in work—and mostly pioneer work—covering such an immense ground, and necessarily demanding self-correction in the light of subsequent conclusions.)

Result of his Work. Conclusion.—Both in his lifetime and after his death Cujas was esteemed abroad as much as in his own country. It is related that the professors in Germany were accustomed to raise their hats when they mentioned his name.² Le Conte (Contius), one of the most learned of his contemporaries, described him as “*vir doctissimus et jurisconsultorum nostri temporis princeps*”³; and it was said that he was the man born to restore jurisprudence to its ancient dignity (“*vir jurisprudentiae in antiquam dignitatem restituendae natus*”). Pasquier, referring to the different schools of jurisprudence, mentions the last as that of the humanists, and awards the palm to Cujas, who, he says, never had, and perhaps never will have, his equal.⁴

Posterity has justified the work of Cujas, the great humanist jurisconsult, and the greatest of his time, as against feudal traditions, scholastic procedure, and the practice of accumulating opinions. He showed how it was possible to transform the indiscriminate and irrational treatment of Roman law into a sound investigation, by which a veritable science of jurisprudence might be established. Literature, history, and philology were henceforth to be brought into the service of legal research. Scholars as well as practitioners interested themselves in Roman law, which came to be recognised as an instrument of general culture, as well as a rich pasture for the practical needs of the advocate and the legislator. The work of the jurist was regarded by Cujas not as a thing apart, but as a part of the life and well-being of the community. With regard to the restoration of texts and the interpretative exposition thereof, the works of Cujas proved a fruitful field for the unsparing gleanings of successors. The editions of the *Corpus Juris Civilis* by Charondas (1575), Pacius (1580), and Godefroy (1583) were greatly indebted to Cujas for textual improvements, as well as for exegetical annotations. Godefroy's edition had authoritative force in the courts throughout the seventeenth and eighteenth centuries; and the parlements were frequently guided in their decisions by the opinions and results of Cujas. Even much earlier, according to J. A. de Thou, the distinguished historian of the time, he was frequently referred to in the

¹ Cf. *Observat.* ix. c. 37; *ibid.* xv.-xvii., passim; *Notata Antonii Mercatoris*.

² Cf. Pasquier, *Recherches de la France*, vii. 8; ix. 29.

³ See the preface to his edition of the *Corpus Juris Civilis*.

⁴ *Op. cit.* ix. 39: “. . . Je donne le premier lieu à nostre Cujas, qui n'eut, selon mon jugement, n'a et n'aura jamais par aventure son pareil,”

tribunals and at the bar as "le jurisconsulte."¹ Towards the end of the eighteenth century the judicial practice of the "pays de droit écrit" was profoundly influenced by his work; and Pothier accepted him as a guide in his *Pandectae Justinianae*, and in those parts of his treatises on contracts relating to Roman law. And so the work of Cujas served as an authoritative appeal and powerful inspiration to successive ages, until it was in a large measure finally embodied in the French Civil Code, which has still more assured it perennial vitality.

¹ *Histoire*, liv. 99, an. 1590.

THE FOUNDATIONS OF CRIMINAL LAW.¹

[Contributed by SIR JOHN MACDONELL, C.B.]

EVERY system of criminal law rests on certain ethical assumptions or postulates, some of them of very ancient date, and common to all criminal systems in modern civilised countries. Most of them were at one time in full accordance with popular conceptions as to crime. The strength of the criminal law is to be found in the general accordance between it and the public conscience ; and, broadly speaking—though, of course, subject to very many exceptions—that harmony has existed in the past. The point to which I invite consideration is that some of these postulates and fundamental conceptions are changing ; that there is a process of disintegration going on very rapidly in some parts of criminal law ; that there is a break-up of the old basis, the intrusion of new elements, the expulsion of old ; that, in the phrase of Nietzsche, in this region there is an *Umwertung aller Werthe*, with the result of the disturbance or impairment of that harmony between the opinions of plain men and the principles of the criminal law which was the best security for its observance and the true chief defence of society. An act is a crime, we are told, for the pure sociologist when it offends the strong and definite collective statements of society.² That test no longer fits many so-called crimes. No one can be familiar with the Criminal Courts of this country without being aware of new doubts on the part of those administering the criminal law : whether it is what it ought to be ; whether its ponderous machinery does much good ; and readiness on their part to admit that it is at best a clumsy instrument for the repression of crime. It is found that not a few prisoners look at their punishment in a very different light from that in which their predecessors did ; they, too, have their “ new horizons of criminal law.” The books and the letter of the law in regard to several matters—*e.g.* infanticide of illegitimate children and insanity—are in marked discord with popular sentiment. If I am not much mistaken, ours is a time when, in regard to criminal law, men officially profess doctrines which they do not practise, and practise that which they do not openly profess. There is much underground work going on in this region. I will try to examine its nature.

¹ An address delivered to a section of the Congress on Destitution and Crime.

² Bosanquet, *Philosophical Theory of State*, 37.

I may note, as a significant circumstance, that two European countries have of late adopted new criminal codes—Holland in 1881, Norway in 1903—and, further, that no fewer than three European countries are now engaged in altering their criminal law, and on a great scale. Austria, Germany, and Switzerland have, for some years, been preparing new codes.¹ In several of our colonies, self-governing and Crown, new criminal codes have of late been adopted. In this country a similar movement—I might well say revolution—is going on, and nowhere with equal rapidity, though it does not take the form of a general measure of codification. We are doing piecemeal what these countries are doing wholesale and on a large scale. The circumstance that we take one step at a time hides the magnitude of the changes accomplished in a given period. And what strides have sometimes been made at once! The late Mr. Justice Stephen studied criminal law as no one else of his generation did. Let any one turn from his books, the *History of Criminal Law* and *Treatise on Criminal Law*, to the recent reports of the Prison Commissioners, or to Mr. Winston Churchill's speech in July of 1911, and it will be seen how far we have travelled and at what a pace.² These volumes, some of which are not twenty years old, which are read by all law students, and are indispensable for examinations, belong, in some respects, to another world. They put in the forefront of the objects of criminal law the satisfaction of the thirst for vengeance,³ the doctrine which you find in primitive criminal codes; for example, in the early laws of Iceland, where men kept up their feuds for years, and where it was deemed highly honourable that one Icelfander had travelled all the way from his home to Constantinople to slay some one who had killed a kinsman.⁴

The progress of disintegration and transformation is not new. But it is much more apparent and more rapid than it was. Subversive doctrines, once unknown, or confined to books little read and to theoretical teaching, directly affect legislation and the administration of the criminal law in ways never before known. These changes are now coming to a head. They are the work of many causes. Chief among the immediate causes have of late been books, poems, and plays which have popularised the newer doctrines; such as *Les Misérables*, *The Resurrection*, *Crime and Punishment*, Galsworthy's *Justice*, *The Ballad of Reading Gaol*.⁵ With these changes going on, in what direction are we moving and what are the driving forces at work? These are the questions for which I seek answers.

¹ "Ce malaise général qui dénote la rupture du système ancien des désirs et des idées réglé supérieure de la conduite" (Tarde, *Philosophie Pénale*, 405).

² See Mr. Galsworthy's letter, *Times*, July 23, 1910.

³ *History of Criminal Law*, ii. 82.

⁴ See Heusler's *Das Strafrecht der Isländer Sagas*.

⁵ *The Ballad of Reading Gaol*. It is noteworthy that Godwin's *Justice* had a like effect more than a century ago. So had his novel *Caleb Williams*, the most powerful satire upon the criminal law of the eighteenth century.

See also *Unser Verbrechen*, by Iwan A. Rodeonow.

It will, I think, be found that great changes, productive of others, are observable. The first is a widespread and growing sense of the inevitableness of many crimes, the helplessness of most or many of those who commit them. Under all criminal law hitherto has been the assumption that men were masters of their conduct; that they were what they made themselves; that their acts were their own. Now that belief is shaken; there is the widespread belief ever hardening that the criminal, even if completely sane, is generally not his own master; is not self-sufficient for guidance of his own conduct. Sometimes it is said that he did not make himself; that he is the last of a long series of individuals; that the potter is not more to blame for the flaws in his own character and the results of them than are the vessels which he turns upon his wheel. According to a doctrine often heard in foreign Courts, and now becoming familiar in ours, heredity determines the character, and the character determines the crime. We are what our fathers have made us; so far as we are not, we are, it is said, the creatures of circumstances. We all know how much the *milieu* may affect the young; how crime naturally comes in certain circumstances. The idle and unemployed cannot be expected to keep out of mischief, or to be sober and well conducted. The environment is everything, it is said, to the ordinary human being, young and old. And then the determining all-powerful environment may, if I may use a paradox, be so remote. A bad harvest in America or failures in Germany or the United States—these incidents, unforeseen and uncontrollable, may produce distress and thereby crime against property in England. All that is expressed in such sayings as "The environment makes the criminal," "Society is responsible for crime," "Society has the crimes which it deserves," sayings which were novelties when Quetelet first propounded some of them, but which are now part of the creed of the man in the street, and are often pleaded, sometimes sincerely, as defences or extenuations by prisoners. So far as crimes against property are concerned, they are very largely the results of squalid poverty, just as are also certain diseases. In our English prisons, at any one time, about 15 per cent. of the inmates are there for such offences. It cannot be doubted that this would fall to a very small figure if there were a general rise in comfort.

I need not say that this sense of the inevitableness of much crime is strengthened, perhaps erroneously, by the familiar fact of the apparent regularity of criminal statistics. The coincidence which they reveal between the increase or decline of crime and certain economic phenomena is impressive, to some minds conclusive. The figures, especially in simple communities, where there are not many complex or disturbing causes at work, show certain crimes rising or falling according to the price of food, which price may be regulated by causes over which the sufferers from them have no control.

A further important change is to be noted. I mean the growing sense of the failure of criminal law to accomplish its chief ends—either to deter, reform or prevent. On all hands this is admitted, even by those who most

freely admit the admirable work which is being done. Let me quote one of the latest dicta on the subject by Professor Willoughby: "As a matter of fact, so far as regards the reformatory idea, there would probably be a consensus of opinion that upon the whole criminal law, as it has actually been administered in the past, was far more corrupting than elevating to the individual punished." That may be an extreme statement. But it is now generally admitted that the influence of punishment as a deterrent from crime was enormously exaggerated in the past, and not least by those who, such as Bentham, honestly sought to reform the criminal law. To operate as an effectual deterrent the prospect of future punishment presupposes a certain degree of imagination, some power of self-restraint, and of sacrificing the present pleasure in view of the future. The normal man is capable of that. The practical problem is how to deal with the mass of more or less feeble-minded persons who are not. They might be deterred from crime if a policeman was always on the spot. They are unable to grasp clearly the idea that they may be punished to-morrow, or a few weeks hence.

Yet another change: one akin to those which I have just named. There is an almost universal disbelief in the efficacy of the prison in attaining its objects. This is no accident. The different aims in view are well-nigh irreconcilable. I do not refer merely to the conflict between feelings of humanity and deterrent effects; the difficulty of finding punishments at once dreaded and yet not injurious mentally, morally, or physically. There is the difficulty due to the presence or collection of such heterogeneous elements. "Roughly speaking," writes one very familiar with our prisons, "the men and women who inhabit our prisons may be classified under five heads: first, the feeble-minded; second, the physical weakling; third, the vagrant; fourth, the casual offender; fifth, the habitual offender. . . . It is certain that a tremendous difficulty arises where the discipline and routine of any one prison, however well conducted, is made to serve for the whole of the classes." (Mr. Holmes, *Hibbert Journal*, October 1910, p. 113.) It is a difficulty which we seek to surmount by splitting up the prison into several parts—the industrial school, the reformatory, the Borstal institution, the convict prison, etc. It is a difficulty which cannot be altogether overcome. I do not wish to pitch the argument too high or to speak of the bankruptcy of punishment. Its limitations are more and more recognised.

I put much the same facts in another way in saying that there is a widespread sense of the imperfection of criminal law as an instrument against crime; of its limitations, the clumsiness of it all; the fact that the criminal law reaches only a small class of the enemies of societies; that many evil-doers and, I may add, some of the most dangerous and powerful wholly escape its operation. I do not refer merely to the practical immunity of certain classes of offenders, owing to difficulty in obtaining evidence or the uncertainties of trials. I speak of the abstention, necessary abstention, of law from interference with actions admitted to be more mischievous to society than the bulk of the

offences at which it strikes; for example, its inability to deal effectively with fraud and deceit in the many forms in which they flourish in our society, Murder, theft, embezzlement are not the offences most fruitful in evil; the libertine, the prodigal, the filthy-minded writer, the irresponsible journalist may be ten times more mischievous.

Criminal law can deal only with external acts; it cannot penetrate the region of evil desires and intentions which by accident have not borne fruition. "In certain cases of epilepsy in so-called recovered patients from asylums, a single glass of beer will convert an ordinarily quiet individual into a howling, frenzied maniac, and the magistrate who punishes the repentant offender has often consumed more alcohol with his lunch than the total amount which produced the situation."¹ Deep repugnance towards the offender is impossible in such circumstances. The man who, according to the language of indictments of the sixteenth and seventeenth century, was "moved by the devil," who, in the technical language of present criminal law is actuated by malice, is now believed to be the creature of circumstance. How can it be possible to abhor one who is, in the language of modern criminology, only an "élément pathologique" (Duprat, *L'Instabilité Mentale*, 203), and of whom the most that can be said is that he cannot form with others a coherent whole? Far be it from me to deprecate this sympathy. It remains to be seen how far sympathy with the criminal is compatible with sympathy with his victim.

I come to a deeper change. Philosophy is always an unbidden guest, a troublesome intruder, among jurists. But there is no shutting it out. It will enter in disguise if it is not invited. It may be tabooed and warned off the premises. But it will somehow gain admittance. Our choice here is between good philosophy or bad. What the best minds, pondering long on these subjects, think, gradually and inevitably percolates into others, and one day affects daily practice. Great is the might of facts, but greater still that of ideas, which propel or drive home facts. For centuries men had talked "facts" and allowed hideous practices as to punishment to continue under the cover of law. A few jurists—Beccaria, for example—propounded a pregnant idea as to punishment, and these practices were condemned and doomed to disappearance.

Now one cannot but recognise the fact that a large number of persons believe either that free will is a delusion or that some form of determinism which practically excludes it is the truth. It may not be expressed dogmatically; the belief may take various forms, and some tentative and vague. But we stand face to face with the fact that free will, *i.e.* the *arbitrium indifferentiæ*, which was deemed—it may be quite erroneously—essential to responsibility, is not accepted by many²; that if a reality, it must be understood with large

¹ "Alcoholism and Irresponsibility," by E. D. S. Todd, M.D., *Transactions of the Medico-Legal Society*, vol. iii, p. 55.

² Free will: "Cette momie qui encombre le chemin de la science." Maus, *Justice Pénale*, p. 22.

qualifications. Centuries ago the Churches of the world had to try to reconcile their doctrines as to sin and guilt with predestination ; to-day the State seeks to reconcile punishment with the absence of free will. I am aware that in the view of others, so-called freedom, in the sense that no one, not even a man himself, can tell what in any given circumstances he will do, annihilates the conditions of responsibility.¹

I am not inquiring into the justification of these changes ; I am only noting facts, and inquiring what must be the results ? First and foremost is the fact that the conception of sin is gone, that the sense of guilt as to crime is disappearing, and with it the sense of abhorrence of crime. Partly from a sense of pity, partly from indifference, and partly from causes more obscure, there is toleration towards offenders such as was never before known. There is a complete revulsion of feeling.

What are likely to be the consequences of these changes ? Some of the results are still problematic, still incomplete. Others are already written on the statute-book. If we are not to punish the criminal but to reform him, if not the crime but the criminal is to be considered, and the punishment is to be adapted to his condition, what does this involve ? Obviously a complete reversal of what for years was the doctrine of reformers of criminal law. It means uncertainty in punishment ; the abandonment of any clear preappointed consequence of the infraction of the law. The reformers of the beginning of the last century—I may say all the great reformers since the time of Beccaria—were bent upon introducing certainty into the administration of the criminal law. They said, and with truth, that punishment could be an effectual deterrent only if it were known what must be the consequence of wrong-doing. They explained the futility of the death penalty, so frequently imposed, by the fact that juries often refused to convict, that pardons were freely granted, and that wrong-doers trusted to the chances of immunity. If the mental and moral condition of the offender is to determine the punishment, each wrong-doer may take to himself the comforting assurance that there is something in his case which will secure him escape from the worst consequences.

There is a further consequence which, startling though it is, some modern jurists are prepared to face. If the condition of the criminal is the great fact of consequence, if the chief business is to correct his evil disposition, why, assuming that disposition is proved, wait for the accident of the crime ? Why not take measures as soon as the dangerous disposition is revealed to protect society ? It seems folly to delay, or to be fettered by such antiquated maxims as *Nulla pœna sine lege*, *Nullum crimen sine lege*. The element of what is "Anti-Sociality" may be revealed in small as well as great things, in the child as well as the man. One writer, Tagantzeff, goes so far as to say that the man who strikes a dog or kills a canary reveals a bloodthirsty disposition (Gretener, p. 108 n.), and should be

¹ For example, Bradley, *Ethical Studies*, p. 11.

promptly dealt with as a danger to society. It is, of course, admitted that it may be extremely difficult to ascertain the presence of the disposition which society has to dread; but when it is detected the time for intervention so as to repress the germs of a habit has come.¹

Usually the exponents of these theories advocate mild treatment of criminality. Consistently they need not. Some, in fact, do not. If the prison is a hospital, why release the patient until he is cured? If he is incurable, why release him at all? The Canon criminal law—to the spirit and some of the methods of which we are unconsciously returning—imposed no limit to incarceration except true repentance. The contention of some is that the imprisonment shall end only with the cure.

One point is fairly clear. The conception of guilt, even if it survives, as attaching to crime, must be affected profoundly. That conception has more than once changed. It attached, according to ancient ideas, when there was no personal wrongdoing. Œdipus was guilty, though he had done wrong unwittingly. He killed his father; he married Jocasta; he did all unknowingly. It was guilt all the same. It might attach to the descendants of the actual offenders.² A later conception imposed a subjective test of guilt; there must be conscious wrongdoing. The modern notion is to eliminate guilt altogether; the notion of sin has gone; guilt must go with it. I may here quote the saying of Von Liszt, the leader of the new school of criminal law reformers in Germany, "*Schuld und Sühne* may live in the creation of our poets; against scientific criticism they cannot stand"³ (*Strafrechtliche Aufsätze*, ii. 229).

I come to a central question. With these changes, what becomes of responsibility; in what sense is it true of the criminal if he is not a free agent? To believe M. Ferri and the members of his school, responsibility is a delusion; it was the weakness of early criminologists not to recognise this. Speaking of the exponents of the classical school, he remarks: "Beccaria, Bentham, Romagnosi, etc., renferment toujours dans leur système, comme critérium et condition supérieure à l'utilité ou nécessité sociale, cette idée de responsabilité morale que nous, au contraire, excluons tout à fait de la fonction défensive sociale" (p. 20, quoted by Gretener, *Die Neuen Horizonte im Strafrecht*).

Another class of writers, alarmed at the consequences of this theory, indulge in such sayings as these: "Ohne Willefreiheit weder Schuld noch Vergeltung" (Liszt, quoted by Birkmeyer, 14). "Under the reign of a mechanical determinism the notion of personal guilt is quite illegitimate"

¹ Plato on one occasion reproved a boy for playing some very stupid game. "Thou reprovest me," said the boy, "for a little thing." "But," replied Plato, "habit is not a little thing." (*Momerie on Character*, p. 20.)

² Schmidt, *Die Ethik der Alten Griechen*, i. 71.

³ I know no more powerful presentment of the modern idea than in the novel by M. Rod, *Le Glaive et le Bandeau*, from which I have borrowed the above illustration.

(Galloway, *Principles of Religious Development*, 327). "Wenn es keinem freien Willen gibt, so ist der Verbrecher nicht anders anzusehen als Tier, dass man zu zähmen und zu dressieren versucht" (Von Hertling). Rümelin is clear and to the same effect: "Keine Dialektik in der Welt wird es aber jemals dem natürlichen Sinn und Bewusstsein ausreden, dass, wo keine Wahl auch keine Schuld und wo keine Schuld auch keine Strafe sein könne" (Reden, *Neue Folge*, 49). Kohler (*Moderne Rechtsprobleme*, 22), refuting those who would confound responsibility with the quality of the act (*Wertschätzung*), declares that the foundation of the criminal law is the freedom of the will. In fact, the criminal codes of Germany and Hungary make it the condition of responsibility.¹

I repeat I am not discussing the accuracy of these opinions. I am quite aware that under a determinist theory of morals a meaning may be given to responsibility, and that indeed according to the contention of some it is incompatible with freedom of will in the sense of ability to act independently of motives. All the same, the opinion that the two cannot go together exists; and the new doctrine seems incompatible with that hatred of or repulsion for crime which was one of its chief preventives.² To read some of the modern writers on criminology, criminals are to be regarded just as one regards a wire fence or a high explosive. They kill or stab or steal, because, in the words of Dr. Watts, "it is their nature to." Godwin, in his *Political Justice*, Book VII. chap. i., anticipating some modern teaching, says, "The assassin cannot help the murder he commits any more than the dagger with which the deed is committed." Some modern criminologists do not hesitate to draw similar conclusions. "If a human being," says one writer, "has bad dispositions implanted by Nature, there is one reason more for merciful treatment." The author of *Erewhon* would punish the sick and cure the wicked. Certain criminologists, if logical, ought to agree with him.

A further result here and elsewhere has been to throw into confusion the legal doctrines as to insanity. The old criterion has been abandoned. The new one has not been found. It has long been clear that the old tests of insanity need revision or modification in the light of the teaching of psychology, respecting the will and diseases of it. It is admitted, even by those who cling to a belief in the freedom of the will, that it may be paralysed wholly or partly; that certain habits enfeeble it; that, on the other hand, it may be educated and strengthened. It may not be possible, by training or otherwise, to alter the deeper and more permanent elements of character (Ladd's *Descriptive Psychology*, p. 372). But habits of will may be formed or destroyed; the intelligence may be clear, and the will weak. It

¹ See speech by Dr. Otto Meyer in Meeting of Juristische Gesellschaft, April 8, 1911.

² One of the characters in M. Rod's novel says: "Suppose que la responsabilité est un fait réel, et nous savons fort bien que ce n'est une fiction—une des nombreuses fictions qui nous aident à vivre" (p. 248).

follows—and all psychologists apparently admit—that a perception of the moral quality of conduct may co-exist with inability to restrain conduct; an admission fatal to the test in *McNaughten's* case. Whether logically or not, the conception of limited or attenuated responsibility has got a footing in legal systems. I note, too, in many recent writers a tendency to give a very comprehensive meaning to insanity so as to include all instances of excessive instability of mind, the tie between acts being feeble or uncertain.

I have described some of the chief changes which have been going on. I have sought to state these new principles in their nakedness, and to draw from them their logical conclusions. But the advocates of them as a rule shrink from the latter. Thus few would go so far as to punish the mere disposition irrespective of conduct or the attempt to commit a crime with as much rigour as the actual crime.

A further subversive consequence. It was the object of the older criminologists, in accordance with an instinct in men, to establish some sort of proportion between the gravity of the crime and the punishment; to make the offender in small things suffer lightly; to visit great crimes with heavy suffering. Bentham is all for "proportionality," and he blames his predecessors in this field of inquiry, Montesquieu excepted, for ignoring it. Yet if we are to think solely or even chiefly of the mental condition of the criminal, rules as to proportionality have no meaning or justification; there must be no stickling about equality. What reason for retaining the distinction between great and small offences since the anti-social feeling may be revealed in both alike? As M. Tarde justly says: "*Le malheur est que individualiser la peine, c'est inégaliser pour des fautes égales*" (quoted by Gretener, p. 109 n.).

To sum up and to define the present situation, we are in a dilemma. We wish both to reform the criminal and to protect society. But the more the criminal law becomes merely reformatory or educational the less does it become a deterrent; the more it becomes a deterrent, the less it is educational. We wish both to deter and also to be humane. But the more we act in one way the less we act in the other. We wish to treat each person according to his individual needs, and at the same time to make the operation of the law certain, so that every offender may know what is in store for him. But the more we individualise punishment, the more uncertain it becomes. We wish to be humane and yet to reform and deter. But it is found that the repeated imposing of short sentences, which the late Mr. Hopwood thought the great desideratum, may be mischievous and futile. We wish to protect society and at the same time to be humane. The attainment of the former may be impossible without measures such as prolonged incarceration, from which humanity recoils. In this conflict between antagonistic aims and modes of treatment seems to be the bankruptcy of criminal law as hitherto understood.

Gretener tells us that the criminal code of the future will have nothing in

common with the codes of to-day except the name (*Die Zurechnungsfähigkeit*, p. 2).

What conclusions do I draw from these remarks? The first is that you must endeavour to restore, if possible, this lost harmony. In the administration of the criminal law, in the classification of crimes and the imposing of punishment, you cannot eliminate one element; the sense of justice, whatever be its ultimate analysis, whether it be a remnant of the retributive theory, or the desire for revenge; whether you call it the demand of the conscience of people or "ce besoin étrange et profonde de symétrie" (Tarde, *Philosophie Pénale*, p. 38), or whether it is a growth in moral perception. If you do not satisfy that sense, I may add the growing sense of justice, your criminal law has no support except that which force gives to it. It is something apart from the people. While becoming more scientific, it becomes pedantic and inoperative. According to Athenian law, each guilty person proposed the punishment which he deemed proportionate to his fault. Literally observed, this law could not be; and Socrates, we know, found that where it existed it did not always count for much. But underlying it was the truth that punishment should be that which the community, or the best part of it, would approve.¹

Second conclusion: We cannot solve the problem in the lump; each criminal is a separate problem. The early Christian kings and missionaries who sought to convert heathens in battalions and platoons were perhaps not more unreasonable than those who would transform criminals in crowds or batches.

The third conclusion which I draw is that there is no ground for despair—rather is there ground, if we take long views, for much hope. Let us see what the actual problem is, so far as England and Wales are concerned. On August 29, 1910, there were in custody in convict and local prisons about 12,060 for what I may call offences of a truly criminal character. Many of these, no doubt, returned to prison in the course of the year. But multiply that figure by two or three, and assume a large proportion of them to be criminally disposed, you are dealing only with a small town—numerically, an insignificant part of the nation. The Prison Commissioners, in their report for 1910-11, remark:

Judicial statistics have for many years included, in the term crime, many new indictable offences which are criminal in character, and it is a fact that if they are computed together with indictable offences strictly so-called, there has been a very remarkable decrease of offences committed; whereas in 1900 a total for both classes was 152,511—for the last recorded year it was 141,555 (p. 7).

These are large though diminishing figures; but they are small as com-

¹ It is notable that all the most modern school attack the jury as being unreasonably lenient (Tarde, *Philosophie Pénale*, p. 435).

"When punishment is no longer a terror to the law-breaker it will no longer be a protection to the law-abider" (Correspondent of the *Times*, Sept. 6, 1910).

pared with the figures for pauperism. On the same date (August 1910) the paupers in England and Wales were 763,954 ; of these 118,864 were insane ; and the expenditure was £14,479,028. In other words, crime, in its strict sense, is of much less consequence than it was, whether measured by population or wealth, and of far less importance than pauperism. Not wickedness, but weakness or inefficiency is the enemy to be dreaded.

The fourth conclusion which I draw is that the weight of law and of public opinion should be thrown, not, as in the past, into punishing, but into eradicating the causes of crime. Each rise in any particular form of crime—and it is one of the most important conclusions which I draw—should be the subject of inquiry. Not only should each State, but each town, make it a duty to investigate the causes of crime within its borders, just as it would investigate the causes of disease. I hope that some day there will exist machinery by which every community will be able to learn the causes or occasion of all crime committed within its area.

One result of such inquiries would be to break up the society in which many a hardened criminal lives. Dr. Mercier remarks with truth : “The defect of the acknowledged criminal is not that he is impervious to the motives of seeking approbation and avoiding its reverse, but that the approval that he seeks, or the disapprobation that he tries to avoid, are not those of society at large, which are adapted to its own welfare and maintenance, but of a small community, parasitic on society, in which morality, so far as it exists, is different from that of society at large” (*Conduct and its Disorder*, p. 176). Such societies, the breeding places of crime, are to be destroyed.

The last conclusion which I would draw is that crime must be combated outside prisons. You must inspire hope rather than fear, and hope does not flourish within their walls. Punishment having proved ineffectual, it may be necessary to resort freely to rewards in particular cases, though such a course is obviously liable to abuse. You do not get to the roots of crime unless you deal with three things : poverty, the accompaniment of almost all crimes against property ; disease and low vitality, the sources of not a few crimes ; existing defective moral education, the source of most other crimes. In combating and vanquishing poverty, ignorance, want of self-control, and disease, you are combating and vanquishing crime also.

A FEW OBSERVATIONS ON WORKMEN'S COMPENSATION IN GERMANY AND HERE.

[Contributed by JULIUS HIRSCHFELD, ESQ.]

GERMANY treats the Compensation of Workmen as part of her general insurance scheme. The person liable to indemnify is not the individual employer but corporate bodies formed by the Government and composed of all the employers of the single industries by districts into which for that purpose the State or States have been divided. The members contribute to the funds *pro rata* of the wages and salaries which they pay out.

In this way the German law avoids the anomalies from which we suffer here through rendering an employer, who might have been the most conscientious man in guarding the safety of his labourers, liable for an injury sustained by an employee who might have been grossly negligent in the performance of his duty. It has been said of the Act that it has introduced a novel principle; but I consider that a misleading euphemism. So far from introducing a principle it has constituted a most unscientific departure from all the principles which make up and should make up the law of contract and tort. It would of course be futile to theorise on the subject at this time; but I believe the contradictoriness of the legal conception has in a considerable degree contributed to the groping about of the judiciary in its efforts at defining and circumscribing the practical scope of the measure.

There are chiefly three points which in the application of the new law have proved such great stumbling-blocks. These points are: (1) What is the legal nature of an accident within the meaning of the Act? (2) What must be the connection between the employment and the accident? (3) How and by whom must the accident and its connection with the employment be proved?

(1) German legislation, like English, does not contain a definition of "accident." The books define it as "any physically injurious and sudden physical effect of an external occurrence or state, on the human body, not intentionally brought about by the injured person." This definition logically excludes trade diseases and such diseases which appear incidentally or become worse in the natural course of the employment. On the other

hand it would not exclude a disease which might have become worse in consequence of an accident incidental and traceable to the employment.

The English definition may be said to be this: "'Accident' is used in the ordinary sense and means a mishap or untoward event not expected or designed" (*Fenton v. Thorley*, H.L. 1903, W.N. 149). Now I venture to say that this definition is so studiously vague, omitting even to say whether or not the design must be absent only from the mind of the injured person himself, that it cannot be generally helpful to the application of the law.

Further propositions which we gather from German books are these: The physical injury needs not be immediately recognisable, and may even show itself after a considerable interval. It needs not be brought about by the accident alone, and it suffices if the latter is one of several causes. Illustration: a pavior who suffered from gall-stone had to lift exceptionally heavy border stones. A rupture of the intestines ensued. The Court held that an "accident" had occurred, even though medical experts declared it to be probable that the gall-stones had got jammed in the appendix before the exertion.

We have an analogous case in *Clover, Clayton & Co. v. Hughes* (H.L.E. 1910, W.N. 73), where a workman suffering from aneurism was tightening a nut by a spanner and dropped dead from rupture of the aneurism. (This latter description seems to me a terminological inexactitude inasmuch as "aneurism" is a disease; and it is not the disease which was ruptured, but the diseased artery.)

An accident (according to German law) can happen without an injury of an external description and physical contact: An employee of an estate owner on a very cold day was ordered at a chase to remain standing for hours on a certain spot. He contracted chilblains. This was held to be an "accident." Otherwise the case of *Warner v. Couchman* (C.A. 1910, W.N. 266, (1912) H.L.), where a journeyman baker was refused compensation for being injured by frost-bite whilst out on his rounds. But of course the circumstances were somewhat different. Still I may remark that it would be difficult, without artificial reasoning, to distinguish between the two cases (German and English respectively) unless the *culpa* of the employer is taken into consideration, which on principle it should not.

In the case of a carpenter who sustained a sunstroke while at work on a very hot summer day it was, in Germany, also held to be an "accident."

An analogy to a certain degree is afforded by *Ismay, Imray & Co. v. Williamson* (H.L. 1 (1908), W.N. 192), where a workman in a weak condition, raking out ashes from under the boiler of a steamship, sustained a heatstroke. A difference here also between the two cases lies in the fact that the former injury was due to an elemental cause, the latter to a circumstance incidental to the employment.

An interesting case arising from a psychological cause came before the

German Courts, when a workman whilst scared by bees was run over by a vehicle and sustained a heartstroke. He was considered to come within the Act, even though he had been suffering from calcination of the blood vessels. It will be observed that the man's fear had no direct causal connection with the employment. In England, on the contrary, *Craske v. Wigan* (1909, 2 K.B. 635), the Court decided against the lady's maid who in the course of her employment, alarmed by a cockchafer, involuntarily hit her eye and injured her sight.

In the case of a stove-setter who, suffering from *tabes dorsalis*, was working hard in a draughty place, and in a state of perspiration lifting 20-24 lb. slabs, suddenly felt a keen pain in his eyes and lost his sight, the complaint was considered an accident due to an acceleration of the nerve-decay owing to the incidents of the work.

Where the injury or death cannot be traced to circumstances constituting the operating cause it is not an accident within the meaning of the Act.—*e.g.* a tuberculous subject who, in the course of ordinary occupation and without a special external cause, got hæmorrhage of the lungs did not come within the scheme.

A driver of a watering car who suffered from heart and kidney disease suddenly fell off his seat on the car and was immediately taken into a house where he died. No external cause being recognisable, natural development of the heart disease only was assumed and the claim failed.

In general it may be remarked that according to German opinion, rupture injuries can only in very rare instances be traced to the employment. But there are certain pathological signs by which it can be determined whether the rupture was caused thereby.

(2) The German Act postulates that the accident shall have happened "*bei dem Betriebe*," which means incidentally, locally, and temporarily in connection with or at the work. This would naturally imply "*in the course of the employment*" but not exactly "*arising out of the employment*."

We shall see by a few propositions and cases how it is judicially and juridically construed. Starting from the point of view that the employment (*Betrieb*) need not be the only cause of the accident but must be one of them, compensation was granted in a case where there was present a disease and where another disease supervened which was only indirectly caused by an accident.

Though the causal nexus between the employment and the accident need not be absolute, the determining principle is nevertheless whether or not the object of the occupation or the conditions under which the employee sustained his injury had any direct relation to the employment; therefore, as a rule only from such occupation as is allotted to him, *i.e.* for which he is engaged arises a claim. Still, acts which he has done outside his special authorisation and instructions, but which are to be considered as serving the

objects of the work in general, may also be covered by the insurance. This extension of the strict rule, which I should say would not be recognised in English law, is rather in accordance with the general principles of *negotiorum gestio* of the German law.

On the other hand the protection afforded in Germany is rather restricted as compared with the English law in this important respect, that the walk or journey of the employee between his residence and the establishment, unless taken within the region of the latter, is regularly not considered as part of the employment, even where remuneration is stipulated for the time on his way home. So a workman who, on his way home, had fallen into a lime kiln close to the establishment was refused compensation ; whilst another in the same circumstances inside the area of the works was held insured. In this regard we know how the English law differs and what difficulties have had to be overcome in its application. I will only refer to *Cremin v. Guest, Keen & Nettlefolds* (C.A. 1908, W.N. 6).

What an employee does for the satisfaction of his own special physical inclination, as resting, eating, sleeping, is regularly excluded from the insurance. It is, however, otherwise if in connection with the scope of the employment, *e.g.* in the regular intervals of the working time set apart for rest and recreation and within the pale of the establishment.

Forbidden acts, if contrary to law, are not insured against ; if, on the other hand, contrary to the establishment's special regulations they might be insured against if in the interest of the work. This distinction is also in conformity with the German principle of *negotiorum gestio*.

(3) In German practice the burden of proof, though in the first place resting upon the claimant, is lightened in so far as the Court *ex officio* examines the question as to the connection between the accident and its alleged causes ; and furthermore through certain presumptions in favour of the plaintiff. This applies in particular to accidents by lightning. Thus it was held in cases where employees, while working on elevated spots or isolated buildings in open fields, were struck by lightning, that the accidents were due to the dangers of the employment. So too where agricultural labourers worked in an open field. And this principle was even extended to cases of postmen carrying letters.

Another presumption laid down is that a workman, whilst within the area of his employment during the appointed time, is serving the work though he should for the moment chance to be unoccupied or occupied otherwise than with his regular employment. During such time and in such circumstances he is supposed to be within the "danger zone" of the work and held to be insured.

A further presumption of "employment-accident" is raised where the body of a workman is found, and the connection between employment and accident cannot be strictly proved but is made reasonably probable.

EUGENICS AND LEGISLATION.

[*Contributed by* EDWARD MANSON, ESQ.]

Drifting.—Jowett once remarked that “if the millennium is to come we must make it.” The recent International Congress of Eugenics, with its 500 delegates from all parts of Europe and America, is a recognition of this truth. The Congress marks a new starting-point in the history of mankind. Let us try to realise its significance. The nations to-day all over the world feel themselves being borne along on the swift, deep, mysterious stream of evolution; urged on by forces they but dimly comprehend—forces irresistible, inexorable, inscrutable. In particular, in the matter of race evolution, the problem presents itself—whither, to what bourne, are they drifting? Is it—as the pessimist thinks—to the gulf of degeneration and race-extinction, or is it—as the optimist thinks—to the fair haven of the perfect State? The aim of the Eugenist Congress is to find an answer to these problems, and the first plain duty it sets before us is that we must no longer let ourselves drift; we must, in Tennyson’s words,

Watch the main currents how they run,

and shape our course accordingly. If the race is to be improved—if it is to be saved—we must study and apply the laws of heredity; we must eliminate the unfit, we must encourage the survival and propagation of the best in all classes. This is not only a social ideal, it is a matter of urgent practical importance. The growing humanitarianism of modern communities under the influence of civilisation and Christianity has long been working, and is still working, against the stern law of natural selection—against the methods of ancient communities and in favour of the “weak things of the earth.” Whatever Greece and Rome may have done, *we* cannot tolerate the ruthless exposure of children, the neglect of the poor, the sick, and the suffering. Sympathy and tenderness have replaced hardness and indifference, and philanthropy is now busy in a thousand forms. All this is well, and God forbid that we should ever go back upon it; but the result is that we find ourselves confronted with a very serious social situation—the multiplication of the unfit. The weak that would have died under the old régime live on, the feeble-minded grow up and propagate themselves—transmitting their taints and weaknesses, their diseases and defects, and with this degeneration of the race an ever-increasing burden is imposed on the rest of the community. How,

then, are we to reconcile humanitarianism with the welfare and improvement of the race? This is the problem which we have now to solve.

The Eugenicist Ideal.—But we must make clear to ourselves at starting what it is which we desire—the ideal for the race at which we are aiming. On this point Plato, who is the first of the Eugenists, had no doubt. In his model State all who married, though they might consult their inclination in the choice of their spouses, were to make the welfare of the State the paramount consideration; and, when married, husband and wife were to “give all their minds” to providing the State with “the best and fairest of children” they could; while an environment and an education, tender but ever vigilant, was to consummate the work in the production of the perfect citizen. This ethical ideal dominates all Plato’s views of the State; it comprehended health and beauty.

And what State is worthy of the name which does not set before it for its citizens the ideal of the noble life—to be, in the Greek phrase, *καλοκάγαθοί*. Here, then, we see at once the limitations of Eugenics—or rather, the complexity of the problems that it has to deal with. It is not a question merely of “breeding” fine and healthy specimens of humanity, though that assuredly is difficult enough. It has to include in its scheme something incomparably more difficult and mysterious, the cultivation of intellectual and spiritual perfection. Physical health and vigour are not enough for the race—man is something more than the “highest of the mammals”; we must have genius, virtue, heroism, and religion,

And love of truth and all that makes a man

and woman in the highest sense. Eugenics has dallied with these things—gossiped a good deal about the heredity of genius; but it has not, so far, seriously addressed itself to this aspect of the question. Nor is this any reproach to the new science. It wisely recognises that Nature’s processes here are too subtle to be tampered with in our present state of knowledge; that the “finely touched spirits” of the world are not to be manufactured. Eugenics, therefore, contents itself for the time with the humbler but all-important function of weeding out those elements of disease, feebleness, and degeneracy in the race which are tainting the healthy stocks and impairing their vitality—leaving the rest to the “Divinity which shapes our ends,” “Evolution ever climbing, after some ideal good.” For though “great wits” may sometimes “to madness be allied”; though Plato thought—and perhaps rightly—that a very robust state of health was not conducive to studiousness, and therefore placed his academy in an unhealthy part of the city; though virtue and saintliness and the heroic soul are often enshrined in a frail and feeble frame; though the asceticism of the mediæval Church delighted to dishonour and degrade the body; we must still postulate for a sound working hypothesis the healthy body as the condition of the healthy mind—as the best soil from which the finest flowers of humanity must in the future spring.

Only the higher purposes of race development must never be forgotten—must, in fact, be kept steadily in view—and mere “breeding rules” be subordinated to moral considerations.

The Eugenist, then, has got his goal in the improvement of the race, physical, mental, moral, and spiritual, but he has yet to reach it. Much can be done—much has already been done by the papers and discussions at the recent Congress—to educate the mind and conscience of the community on this subject; but is it possible in our present state of knowledge to do more—to invoke the State's aid to reinforce by legislation the moral code of the Eugenists? There are three factors involved: (1) Heredity, (2) Environment, (3) Education. Of these three influences men of science are agreed that heredity is the most potent, verifying the old saying that “There is more in breed than pasture”; but environment and education are also potent influences, and in both the State has been asserting itself with growing emphasis during the last fifty years.

Environment and the State.—It has recognised that if the pig makes the sty, it is the sty which helps to make the pig, and in pursuance of this policy the State and its microcosm the municipality have been giving pure water, proper sanitation, public baths, pure food, light, open spaces and recreation grounds, and other conditions of a decent environment. In the matter of dwellings—closely associated with the tuberculosis question—too little has been done, it is true, but the State stands committed, whichever party is in power, to a large scheme of housing for the working population supplemented by a living wage. Most of our great self-governing Dominions have gone farther and passed what are called Homestead Acts to protect the home, whatever happens, from being broken up. The environment, then, of the citizen has been fully recognised as an all-important function of the State.

Education and the State.—So has the education of the youthful citizen. Nothing is more striking in the legislation of all civilised nations for some years past now than the concentration on the child—the care that the young shall not be corrupted by drink, or tobacco, or indecent publications; shall not be sent, if they do wrong, to prison or herded with common criminals; shall not drudge in factories or be exploited for public entertainments or hawk articles in the streets; shall have free meals at school if underfed, and sent to foster homes if neglected; shall not be allowed to roam the streets at night; shall be protected against cruelty and outrage. In these and a hundred other ways the State is showing itself alive to the welfare of the child as a national asset—*spes gentis*. It is doing its best, too, to grapple with the deplorable infant mortality—what Professor Smith of Minnesota University called at the Congress “the tragedy of spoiled babies.” In education then, as a branch of Eugenics, the State is everywhere busy.

Wanted, More of the Best Children.—But the betterment of the race by “an enlightened procreation of children,” as M. A. Pinard calls it, is a much

more critical problem for State intervention. It has two aspects: one is to encourage the bringing into the world of children who will make the best citizens, the other to eliminate the unfit. It is on the first of these that Sir Francis Galton has his eye when he defines Eugenics as "the attempt to bring as many influences as can reasonably be employed to cause the useful classes or members of the community to contribute by parentage more than their proportion to the next generation instead of less." At present—sad to say—we are moving in exactly the opposite direction, not we in England alone, but nearly all the civilised nations of the world—Russia and Japan excepted. In the United States the foreign element is so prolific and the native birth-rate so much on the decline that the Anglo-Saxon race there is threatened with extinction. "It is a fact, as Prof. Karl Pearson keeps urging, that at the present time in Great Britain restriction of families is growing in one-half or two-thirds of the people, including nearly all the best, while children are being freely born to the feeble-minded, the criminal, the pauper, the thriftless casual labourer and other denizens of the one-roomed tenements of our great cities" (Dr. Mott, of the London County Asylums). And if so, what can the end be? This disastrous limitation of offspring among the better classes is due, according to M. L. March in France, where it is most marked, partly to "the fear of falling" under the burden of a large family, partly to "the desire to rise." With us the latter is dominant. "I want the best for my children," says "A Mother" in the recent Family Budget correspondence in the *Daily Telegraph*, and her voice is the voice of middle-class English Philistinism. "The best" means certain social advantages: not the true best, for it is the large family, not the small, which gives us the best citizens. There—in the home of the large family—they learn the civic virtues of self-denial and mutual accommodation, there

They breathe the keen yet wholesome air
Of rugged penury.

Against this sort of parental selfishness, Eugenists can do little by appeals for the future of the race; but the State can do something in the way of what the French call "justice laudative." It can relieve the burden of a large family—it has already done so in the abatement of income tax and by the maternity benefits under the National Insurance Act; it can recognise such civic merit in the rewards and honours of the public services. Municipalities, too, can do much in the same direction. The Borough of Holborn had a Baby Show the other day.

Love Marriages.—Even more fatal to the ideals of the Eugenists than the restriction of families is the desecration of marriage. "Never profane love," said Renan, "it is the most sacred thing on earth"; but in the worldly marriage, love is being profaned every day and unions blessed by the Churches which were never made in Heaven. On this subject Sir James Crichton-Browne was saying some very wise words not long since. "I am a believer,"

he said, "in the love match, not only from the romantic but from the eugenic point of view ; but in a very large number of marriages love plays no part, or only a subordinate one. Rank, social influence, ambition, and what Carlyle called the 'cash nexus' are dominant factors in marriage to-day. But the marriages made under them are not those which are most likely to produce favourable results in the next generation. I feel that I am on firm ground in recommending a return to nature in relation to marriage and with it due allowance for those natural forces that are perhaps more far-sighted in the future of race improvement than we with our best scientific spectacles. Love at first sight of the right kind is a physiological epoch corresponding with the installation of new circuits in the brain. It is like the quality of mercy twice blessed, it blesses him who experiences it, and it is charged with deferred blessings for those who are to come after him." If Plato's "best and fairest children" are to come, they will come from the love match, not from the worldly marriage—"loveless, joyless, unendeared," as Milton calls it. But to teach this must be the care of the Churches. It is outside the sphere of the State.

The elimination of the unfit is a problem of a different kind. The end to be achieved is simple enough—to cut off the supply of degenerates which is tending always to enfeeble and deprave the race ; but the means to this end open up a vista of controversy. They may be summed up under three heads : (1) Restrictions on Marriage ; (2) Sterilisation ; (3) Segregation.

Restrictions on Marriage.—These are to be found among all nations, primitive and civilised. Volumes might be written on them. Sometimes the prohibition is against marriage within certain degrees of relationship, as in our Table of Affinities ; sometimes it takes the form of those curious marriage customs known as exogamy and endogamy. How far these and other customs like them are—or have been thought to be—eugenic or physiological it is hard to say, but it seems more probable that prohibitions like our Table of Affinities, though they may be justified eugenically, originated in the necessity of protecting the home. The modern restrictions are based avowedly on eugenic principles.

Restrictions on the marriage of unfit persons, such as epileptics and feeble-minded persons, have been adopted by many of the States of the American Union. Some of the States—about one-third—have even gone so far as to prohibit marriage between first cousins. This seems quite unwarrantable. In particular cases where there is a common defect on both sides and a danger of its being transmitted in an intensified form, such a marriage may be undesirable, but in such cases it is for a man to say to his doctor "Ought I to marry?" not for legal prohibition. Nor in such cases is a legal prohibition of much avail. Maternity is one thing, marriage another, and "Passion o'erleaps the cold decree." Still less is it of use to deter the feeble-minded, who are *ex hypothesi* incompetent to appreciate such rules of public policy. The chief use of laws of this kind is educational—to found a moral sentiment

or conscience in the community that in contracting marriage the welfare of the offspring must be borne in mind—to emphasise, in fact, Plato's view.

Sterilisation.—But the Eugenists in America have gone much farther than restrictions on marriage. No less than nine States of the Union—Indiana, New York, Connecticut, California, Iowa, Utah, Nevada, New Jersey, and Washington—have passed laws authorising or requiring sterilisation of certain classes of defectives and degenerates, habitual criminals, confirmed drunkards, insane, epileptics, drug habitués, feeble-minded persons. It is only in Indiana and California, however, that the law has been actively enforced. In the former State, which led the way in this heroic remedy, in two years (1907 and 1908) about 125 compulsory operations were performed; in California, since November 1910, some 220, but in most of these the relatives were consulted, and sometimes the patient's consent obtained. The question has been raised whether sterilisation is not within the constitutional prohibition against "cruel and unusual punishments," but it would seem that the form of operation used for sterilisation, viz. vasectomy, cannot be said to come within the category so stigmatised.

The mode of proceeding, as described by Dr. Hutch, General Superintendent of the California Hospitals for the Insane, is as follows:

The superintendent of a hospital having cases that he believes should be operated upon, takes the case up with the father, mother, husband, or wife, as the case may be, either by letter or personal interview, and explains the desirability of the operation, its result, its possible dangers. Consent having been obtained from the nearest relative or relatives, a history of the case, with the recommendation of the medical superintendent, is sent to my office, where the report is considered by the Secretary of the State Board of Health and myself, and our consent granted, if in our opinion it is desirable. The superintendent, on being notified of our consent, proceeds with the operation, a report of the work being sent to and kept on file in the office of the Lunacy Commission.

The Committee, whose Report is given in Prof. Wagenin's valuable paper, sum up their comments on the system as follows:

That vasectomy may become a eugenic measure of considerable value if practised under the general protection of law, but by persuasion, and with the consent of the individual (or his guardians) who is unfitted for parenthood instead of by compulsion.

That the sterilisation laws already enacted in the United States will have to undergo vigorous attacks before the highest Courts before many more compulsory operations are performed, with the probability that there will, eventually, be material modifications of them.

As Prince Kropatkin asked, "Who are the persons we are going to sterilise as unfit, the workers or the idlers, the rich or the poor, the poor women who suckle their children or the women of the upper classes who refuse maternity?"

Segregation and Guardianship.—This is the third method, and it is well illustrated in the Mental Deficiency Bill now before Parliament, which has already passed its second reading. Defectives in this Bill means idiots, imbeciles, feeble-minded persons, moral imbeciles (with strong vicious or criminal propensities), and mentally infirm persons (decayed intellects). Where a defective so defined is also found wandering about, neglected, or cruelly treated, or is charged with an offence, or is in prison or a reformatory, or an habitual drunkard, or comes in the class of “defective children” under the Education Act, *or ought to be deprived of the opportunity of procreating children*, such persons may be dealt with under the Act—that is to say, he or she may under the order of a judicial authority, made on petition, be sent to an institution for defectives, or placed under guardianship. The petition may be presented by any relative or friend of the alleged defective, or by the local authority, which is charged with the duty of ascertaining what defectives there are within its area, keeping them under supervision, and seeing that they shall be dealt with under the Act. The defective being once placed in an institution or under guardianship, there is a series of strict provisions for his or her protection. Any person supplying a defective with intoxicants or assisting a defective to escape, or intermarrying or attempting to intermarry with a defective, or conniving at any marriage knowing that one of the parties thereto is a defective or abusing any female defective, is to be guilty of a misdemeanour punishable with a fine or two years’ imprisonment with or without hard labour. All this is excellent and free from the drawbacks incident to the system of sterilisation, under which mistakes cannot afterwards be rectified. It may fail to satisfy those thorough-going Eugenists who, like Sir James Crichton-Browne, think there are several millions of men, women, and children in our great towns who ought at once to be consigned to a lethal chamber; but the Bill makes a beginning. It secures that a large class of persons who are really not fit to carry on the struggle for existence shall be looked after; it prevents a host of feeble-minded babies coming into the world, and it will prepare the way for further advances towards the eugenic ideal.

CONDITIONS OF ADMISSION TO THE LEGAL PROFESSION THROUGHOUT THE BRITISH EMPIRE (*Continued*).

[Contributed by C. E. A. BEDWELL, ESQ.¹]

INDIA.

Bengal.—*Advocates.*—Barristers of England and Ireland and Advocates of Scotland may be admitted as advocates. Doctors of Law in the Universities of Calcutta, Madras, Allahabad, the Punjab, or Bombay may be admitted after three years' practice in a subordinate court.

*Vakils.*²—The qualification for admission as a vakil is the degree of Bachelor of Law in the University of Calcutta, Madras, Allahabad, the Punjab or Bombay, and two years' service as an articled clerk, before which he must have passed the B.A. examination in one of those universities.³ An additional two years' service will be accepted from non-holders of the B.A. degree.⁴ Before being admitted he will be required to pass an examination in the Codes of Civil and Criminal Procedure, the High Court's Rules (Appellate Side), the Evidence Act, the Limitation Act, the Registration Act, and such portions of the Bengal Tenancy Act as deal with matters of procedure.⁵ An attorney who has practised for three years may be admitted as a vakil⁶ upon passing the prescribed final examination.

The qualifications for a Mukhtar are similar but of a somewhat lower standard.⁷

Bombay.—*Advocates.*—Barristers of England or Ireland and advocates in Scotland may be admitted as advocates.⁸ A Bachelor of Law of the University of Bombay may be admitted after having attended the sittings for one year each of the Original and Appellate Side of the High Court,

¹ The writer is indebted to numerous correspondents who have forwarded official documents which are now preserved for reference in the Middle Temple Library.

² "Pleader" and "vakil" are synonymous terms. *In re* pleaders of the High Court 8 Bomb. L.R. 105, at p. 145.

³ Rules of the High Court of Judicature at Fort William (Appellate Side), 1910, Chap. xvi. Rule I (1) (2) (6).

⁴ Rule I (19).

⁵ Rule I (16).

⁶ Rule I (23).

⁷ Rule 2.

⁸ Rules and forms of the High Court of Judicature at Bombay, Rule 1.

followed by an examination in Personal and Property Law, Contracts, Torts, and the Penal Code, evidence and the procedure of the High Court.¹ Exemption may be granted by the Court to pleaders of ten years' standing who are Bachelors of Law of the University of Bombay.²

Pleader.—An applicant for admission as a pleader must be “a subject of the Emperor or a subject of a native Prince or state in India under the sovereignty of His Majesty,” and more than twenty-two years of age. He must be able to speak, read, and write “with ease and correctness” one of the vernacular languages used in the District Courts of Bombay and have passed the matriculation examination of the University of Bombay or its equivalent at Madras, Calcutta, Punjab, or Allahabad University.³ Before being admitted he must pass an examination in Hindu and Mahommedan Law, Civil Procedure and the Law of Limitations, Contracts and Torts, Specific Relief, Transfer of Property, Mortgage and Trusts, Evidence, Registration and Stamps, Criminal and Police Laws, and by his answers must show himself to be proficient in the English language.⁴ A Bachelor of Law of Bombay University is exempt from the examination.⁵

Attorneys.—Solicitors in England or Ireland or writers to the signet in Scotland may be admitted as attorneys, but are not entitled to take articled clerks, unless they have been in practice for three years.⁶ Any person desiring to be articled must be either a B.A.⁷ or LL.B.⁸ of Oxford, Cambridge, London, Durham, Dublin, Royal University of Ireland, or the Universities of Scotland or Bombay. The period of articles is two years,⁹ but not more than fifteen months may be spent in England, Scotland, or Ireland with a solicitor or barrister in chambers.¹⁰ At the end of his period he must pass an examination in law.¹¹

Lower Burma.—Rules regulating the qualifications and admission of advocates in the Chief Court are dated September 11, 1901. They are made by the Chief Court under the authority of the Indian Legal Practitioners Act, 1879.¹² Barristers in England and Ireland, Advocates in Scotland, may be admitted as advocates at the discretion of the Judges of the Court.¹³ The procedure of the applicant is by petition stating whether he holds one of these qualifications, whether he is an advocate of one of the High Courts of British India or the Supreme Court in any of His Majesty's Colonies, whether he holds a Government appointment, the nature of his previous occupation and career, setting out fully any incidents which might affect the decision on his application and whether it is his intention to practise in the Chief Court or in the Courts subordinate thereto.¹⁴ To the petition must be attached certificates in support of the qualifications, and testimonials

¹ Rule 3.

² Rule 7.

³ Rule 9.

⁴ *Ibid.*

⁵ Rule 10.

⁶ Rules 3, 11, 12.

⁷ Rule 19.

⁸ Rule 21.

⁹ *Ibid.*

¹⁰ Rule 26.

¹¹ Rule 27.

¹² No. 18 of 1879, s 41.

¹³ Rule 1.

¹⁴ Rules 2, 3

from a person or persons in good position of the good character and conduct of the applicant.¹

Upper Burma.—Regulations as to the admission of advocates are made by the Judicial Commissioner by authority of the Upper Burma Civil Courts Regulation, 1896.² Advocates must be licensed by him and are of three grades according to the Courts before which they are entitled to practise. The persons entitled to admission to the first grade are barristers or solicitors in England or Ireland, advocates and writers to the signet or solicitors in Scotland, attorneys in India, pleaders in the High Courts of Calcutta, Madras, Bombay, or Allahabad, and the Chief Court of the Punjab, and advocates of the first grade in Lower Burma.³ Admission may also be obtained by passing the B.A. examination of the Calcutta University or an equivalent and an examination in Burmese.⁴ Advocates of the second grade include those who hold a certificate to practise as pleaders of the second grade in Lower Burma, those who have passed a qualifying examination, and advocates of the third grade of five years' standing who possess the necessary experience and general acquirements to justify promotion.⁵ The examination is the entrance examination of the Calcutta University or an equivalent, or the seventh standard examination in Burma, and a course of law lectures for one year prescribed by the Educational Syndicate, who have the oversight of this department; and in addition to either of these qualifications the candidate must pass an examination in Burmese.⁶ Pleaders of the third grade in Lower Burma are entitled to admission as advocates of the third grade in Upper Burma.⁷ Admission to that grade may also be obtained by passing the entrance examination of an Indian university or the vernacular ninth-standard examination in Burma, and an examination in Burmese.⁸ Applicants for any grade must be twenty-one years of age.⁹ A candidate who declares that he intends to answer in Burmese the questions in the law examination, will be admitted to the law examination without a qualification in Burmese, but any answers to questions which such a candidate may give in English will not be marked.¹⁰

Central Provinces.—The rules for the enrolment of advocates and pleaders in the Central Provinces and Berar are made by the Judicial Commissioner¹¹ under the authority of Acts of the Governor-General.¹²

¹ Rule 4.

² Regulation 1, s. 25. Burma Code, 4th ed. 1910, p. 276.

³ Rules for the Qualification, Admission, and Licensing of Advocates to practise in the Chief Courts of Upper Burma, 1910. Rule 2.

⁴ *Ibid.* Appendix C.

⁵ *Ibid.* Rule 3.

⁶ *Ibid.* Appendix C.

⁷ *Ibid.* Rule 4.

⁸ *Ibid.* Appendix C.

⁹ *Ibid.* Appendix C.

¹⁰ *Ibid.*

¹¹ Approved by the Chief Commissioner by notification No. 2574, dated November 30, 1909, as amended by notification No. 163, dated January 18, 1910.

¹² Legal Practitioners Act 18 of 1879, amended by Acts 9 of 1884, 11 of 1896, and 1 of 1908.

Advocates.—The following may be enrolled as advocates: (a) members of the English or Irish Bar, and members of the Faculty of Advocates in Scotland; (b) vakils who have practised for not less than ten years in one or more of the High Courts; and (c) pleaders of the first grade who have taken the degree of Bachelor of Arts and Bachelor of Law at any British Indian university, and who have practised for no less than ten years in the Court of the Judicial Commissioner.

Pleaders.—There are two grades of pleaders. The first may appear in all the Courts of the Provinces. The second may plead and act in all Courts subordinate to the Judicial Commissioner's Court. The following may be admitted and enrolled as pleaders of the first grade: (i) attorneys in England and Ireland, writers to the signet and members of the Society of Solicitors in Scotland; (ii) vakils or attorneys of the High¹ Courts who have practised in the Courts on the roll of which they are entered for five years; (iii) subordinate judges and judicial officers of a superior rank who have quitted the service of the Government under certain prescribed conditions,² and pleaders of the second grade, who have practised in a District Court for three years. Pleaders of the second grade are persons permanently resident in the Central Provinces or who have served the Government in these territories and possess the degree of Bachelor of Law at any British Indian university.³ Pleaders must take out an annual certificate.⁴ Any person holding a Government appointment or carrying on a trade or any money-lending or other business at the time of his application to be admitted as a pleader must state the fact, and the Judicial Commissioner may refuse to admit or give such other direction as he may think proper.⁵

Madras.—*Advocates.*—Barristers in England or Ireland, advocates of the "Principal Courts" of Scotland, or advocates of the High Courts of Calcutta, Bombay, or Allahabad are entitled to admission as advocates.⁶ If Master of Laws in the University of Madras may be admitted after studying for eighteen months with an advocate of the High Court.⁷

Vakils.—The qualification for a vakil is the degree of Bachelor of Law in the University of Madras, twelve months' service with an advocate, and a certificate from the President of the Pleadership Examination Board of having passed an examination in the law of practice and procedure, civil and criminal. "Every apprentice shall, during the whole period of his service, keep regularly a diary showing day by day the nature and amount of work done by him and shall have such diary initialled at the end of every month by the person under whom he is serving." In addition he is required to

¹ According to ss. 4 and 5 of the Act 18 of 1879, as amended by Act 9 of 1884, ss. 2, 8.

² Rules, s. 4 (d).

³ Rules s. 5.

⁴ Rules s. 10.

⁵ Rules s. 12.

⁶ Appendix I. to the Rules of the High Court, 1905.

⁷ *Ibid.*

answer a number of questions by the Registrar as to the amount of work done during the period.¹

Attorney.—Any attorney or solicitor of the United Kingdom is entitled to admission without examination and also any attorney of any of the High Courts of Judicature in India upon showing that he has served a five years' apprenticeship. A Bachelor of Law of any Indian university may qualify by a three years' apprenticeship.²

North-Western Provinces.—*Advocates.*—Any barrister of England or Ireland or advocate in Scotland may be admitted as an advocate.³ Any Doctor of Laws of Allahabad University may be admitted after having practised for three years in the Courts of the United Provinces.⁴ An attorney or vakil of ten years' standing may be admitted as an advocate.⁵ An advocate of any other High Court of India may appear in proceedings before the Allahabad High Court by special permission of the judge if he has with him an advocate, attorney, or vakil who is on the rolls of the Court.⁶

Attorneys.—A solicitor in England or Ireland, or a writer to the signet, solicitor, or law agent in the Scottish Courts may be admitted as an attorney. The possessor of an LL.B. of Allahabad University may be admitted after having practised for two years in a subordinate Court, or having served continuously for two years as a clerk to an advocate, attorney, or vakil who has been on the rolls of the Court for at least five years.⁷ Unless specially exempted he must before admission satisfy the judges that he has a competent knowledge of Hindustani.⁸

Vakil.—To be admitted as a vakil it is necessary to be an LL.B. of Allahabad University after having taken the degree of B.A. or B.Sc. followed by attendance at 75 per cent. of the lectures in law delivered at two annual courses in a college affiliated to the university. The judges will require to be satisfied that the applicant has a competent knowledge of Hindustani.⁹ The holder of a B.L. degree in the Universities of Calcutta or Madras may be admitted a vakil within one year of obtaining the degree, provided that he passes an examination in Hindustani.¹⁰ Before being admitted to practise the vakil must for two years have practised in a subordinate Court, or been employed as a judgment clerk.¹¹

Punjab.—*Advocates.*—A barrister of England or Ireland, or an advocate of Scotland, is entitled to admission as an advocate. Pleaders of the first grade who have practised as such for ten years, including five years' practice in the Chief Court, or obtained the degree of Doctor of Laws at the Punjab University, may be admitted as advocates, provided that no Doctor of

¹ Appendix I. to the Rules of the High Court, 1905, pp. 72-5.

² *Ibid.* pp. 80-1.

³ Rules of the High Court of Judicature, 1898, with Appendix, 1905. Rule 180.

⁴ Rule 180.

⁵ Rule 183.

⁶ Rule 186.

⁷ Rule 187.

⁸ Rule 189.

⁹ Rule 191.

¹⁰ Rule 191A.

¹¹ Rule 195.

Laws shall be admitted unless he has practised for at least three years after taking his degree.¹

Pleaders.—Attorneys of England or Ireland, writers to the signet and solicitors in Scotland, vakils or attorneys of a Chartered High Court, after three years' practice therein, and persons who have degree of Honours in Law at the Punjab University, are entitled to admission as pleaders of the first grade. Pleadors of the second grade who have been in practice for five years may be admitted to the first grade, or after two years in the case of Bachelors of Law of Punjab University, or three years for the holder of that degree in another university.² The degree of Bachelor of Law is a qualification for admission to the second grade, provided that if it was obtained at a university other than Punjab the holder must pass an examination in the law specially applicable to that province.³ Mukhtars are also of two grades, and must possess equivalent qualifications of somewhat lower standard.⁴

United Provinces of Agra and Oudh.—Any barrister of England or Ireland or advocate of Scotland may be admitted as an advocate, also any Doctor of Laws of the University of Allahabad who has practised for three years in the United Provinces.⁵ Attorneys or vakils of ten years' standing may be enrolled as advocates.⁶ An advocate of another High Court may be granted permission by the Court to plead upon a special occasion if an advocate, attorney, or vakil on the rolls of the Court is appearing in the case with him.⁷

Attorneys.—Any solicitor of England or Ireland or writer to the signet solicitor or law agent of Scotland may be admitted as an attorney, for which the holder of the degree of LL.B. of the Allahabad University may qualify by two years' practice in a subordinate court, or as an articled clerk either in the province or the United Kingdom.⁸

Vakils.—Any holder of the degree of B.A. or B.Sc. of Allahabad University, and the degree of LL.B., may be admitted as a vakil, or if, holding either of these degrees, he has attended 75 per cent. of the lectures in law delivered during two consecutive annual courses taken together in a college affiliated to the university.⁹ Any holder of the degree of B.L. of Calcutta or Madras University may be admitted as a vakil within one year of taking it,¹⁰ provided that no vakil, whatever may be his qualification, shall be admitted without a competent knowledge of Hindustani.¹¹ Before being allowed to appear for a party to an action, a vakil must practise for two years in a subordinate Court or be employed as a judgment clerk in the High Court.¹²

¹ Chief Court of the Punjab Rules and Orders. Order xxix. Rule 2, and amendment. May 27, 1907.

² Order xxvi. Rule 2.

³ *Ibid.*, Rule 3.

⁴ *Ibid.*, Rule 4.

⁵ Rules of the High Court 1905. Rule 180.

⁶ Rule 183.

⁷ Rule 168.

⁸ Rule 187.

⁹ Rule 191.

¹⁰ Rule 191A.

¹¹ Rules 191 and 191A.

¹² Rule 195.

CROWN COLONIES.

Anguilla.—See Leeward Islands.

Antigua.—See Leeward Islands.

Ashanti.—"In no cause or matter, civil or criminal, shall the employment of a barrister or solicitor be allowed."¹

Bahamas.—*Counsels and Attorneys.*—The Court has power to admit to practise any member of the English, Scotch, or Irish bars and attorneys in Great Britain and Ireland,² and any person who has served articles of clerkship for five years continuously with any counsel or attorney in the Colony, and has passed an examination touching the principles and practice of the law.³ The period is reduced to four years if he has passed an examination in the Universities of Oxford, Cambridge, Durham, London, or in Irish or Scottish universities, but the Act does not specify the standard of the examination.⁴

Barbados.—Only barristers from England or Ireland or advocates from Scotland are entitled to practise as barristers in the island.⁵ Solicitors in England or Ireland, writers to the signet or law agents in Scotland may be admitted to practise as solicitors.⁶ Other persons may be admitted by passing the examination and serving the articles of clerkship. The preliminary examination in general knowledge will be excused to holders of a first-class certificate of the College of Preceptors or one of various equivalent examinations.⁷ The intermediate examination can be passed after having served not less than two years of the clerkship,⁸ and the final not less than eighteen months after the passing of the intermediate examination,⁹ but the complete period of serving articles must be five years.¹⁰

Bechuanaland.—The Resident Commissioner may admit as an advocate any person who is a barrister in England or Ireland or an advocate in Scotland, or of any Court forming part of British South Africa.¹¹ He may enrol as attorney solicitors or attorneys qualified in a similar way.¹²

Bermuda.—Barristers and advocates of Great Britain and Ireland are entitled to act as barristers and attorneys in the island.¹³ Barristers and attorneys may be admitted from Canadian provinces granting reciprocal privileges. Service for three years with a barrister or advocate in the island also entitles to admission.¹⁴

British Guiana.—The Supreme Court has power to admit members of the English, Scottish, or Irish Bars, solicitors in England or Ireland, and

¹ Ordinances, Revised Edition (1910), p. 3; Ordinances, No. 6 of 1906, s. 2.

² Statute Law of the Bahamas (1901), p. 190; 59 Vict. c. 26, s. 23. An Amending Act, c. 23 of 1909, sets forth the details which must be certified to the Registrar of the Court.

³ 59 Vict. c. 26, s. 25.

⁴ *Ibid.*

⁵ Act 31 of 1891.

⁶ Act 4 of 1882, s. 5, amended by No. 8 of 1902.

⁷ Act 4 of 1882, s. 10.

⁸ *Ibid.* s. 18.

⁹ *Ibid.* s. 22.

¹⁰ *Ibid.* s. 3.

¹¹ Proclamation No. 15 of 1904, s. 3.

¹² *Ibid.* s. 4.

¹³ Act 4 of 1905, s. 45.

¹⁴ *Ibid.*

writers to the signet or solicitors in Scotland, to practise as barristers or solicitors.¹ Clerks articled for five years may be admitted as solicitors after passing an examination prescribed by the Court.²

British Honduras.—The usual conditions as to the admission of barristers and solicitors of the United Kingdom are in force. In addition, British subjects of colonies and dependencies where the system of jurisprudence is similar to that of England may be admitted, provided that in the case of solicitors they have been articled for five years and passed a qualifying examination. Persons who have been articled for five years to solicitors or barristers in the Colony may be admitted after examination.³

Ceylon.—Members of the Bar in the United Kingdom are admitted to practise as advocates without examination.⁴ Students in the Colony are admitted upon conditions prescribed by the Ceylon Council of Legal Education.⁵ Proctors who have practised for five years may be enrolled as advocates.⁶ Solicitors, attorneys, or writers to the signet of Great Britain may be admitted without passing the examination required from others under the direction of the Council of Legal Education.⁷

Cyprus.—The enrolment of advocates is entrusted to a Legal Board, consisting of the Chief Justice, Puisne Judge, and Queen's Advocate and such other Judges as may be appointed by the High Commissioner. Candidates for admission must be twenty-one years of age, possess a diploma of any University or Law School of Great Britain or Ireland, France, Italy, Greece, Malta, Constantinople, Russia, Austria, Germany, Switzerland, the United States of America, Sweden or Norway, Belgium, Holland or Denmark, and have been six months with an advocate or during a period of twelve consecutive months attended one-half of the sittings of a District Court and has passed an examination in Ottoman Law and Cyprus Statute Law.⁸ Barristers or advocates of Great Britain and Ireland, advocates of France, Greece, Italy, the Mixed Tribunals of Egypt, or the Courts of the Ottoman Empire may be admitted as advocates.⁹

East Africa Protectorate.—Members of the Bar of England, Scotland, or Ireland, solicitors of the Supreme Court in England or Ireland, writers to the signet and solicitors in the Supreme Courts in Scotland, pleaders admitted to practise before one of the High Courts in India, are entitled to practise before the Protectorate Court upon compliance with certain conditions.¹⁰ He must produce proof of his qualification to the judge and pay a fee upon signing of the roll of pleaders of the Protectorate Court. Pleaders must take out an annual certificate.¹¹ The judge has power, if

¹ No. 18 of 1897, s. 4.

² *Ibid.* s. 7.

³ Consolidated Laws, c. 8, s. 11.

⁴ Ord. 1 of 1889, Sched. III. s. 56.

⁵ Ord. 2 of 1900 and No. 1 of 1889, Sched. III.

⁶ Ord. 1 of 1889, Sched. III. s. 52.

⁷ Ord. 1 of 1889, Sched. III. s. 30.

⁸ Ordinance XII. of 1894, s. 4.

⁹ *Ibid.* s. 6.

¹⁰ Legal Practitioners' Rules, 1901, Art. 1.

¹¹ *Ibid.* Art. 2,

the number of pleaders is insufficient, to admit "other persons of good character and sufficient capability" to practise before the Court during his pleasure.¹ Native vakils are only entitled to represent natives.²

Fiji.—The Chief Justice may admit as barristers and solicitors—the two branches are not distinct—any barrister, advocate, solicitor or writer to the signet in Great Britain, Ireland, Australasia,³ or North America, or any other British Colony named by the Governor in Council.⁴

Gambia.—The Chief Magistrate may admit any barrister or advocate in Great Britain or Ireland to practise as barrister, or any solicitor or writer to the signet as solicitor,⁵ but the two branches of the profession are not kept distinct.⁶ He may also admit as solicitor an articulated pupil who has served for two years with a barrister or solicitor in the colony or in Sierra Leone, Gold Coast, or Southern Nigeria.⁷ The Chief Magistrate also has a discretion if there is a dearth of professional advocates to "admit temporarily so many other fit persons to appear and act in the capacity of barristers, solicitors and proctors, as may appear necessary."⁸

Gibraltar.—The two branches of the profession are not separate.⁹ Barristers in England or Ireland, advocates in Scotland, or any person holding the degree of Doctor of Law in the Universities of Oxford, Cambridge, or Dublin may be admitted to practise as a barrister.¹⁰ Solicitors in England or Ireland or writers to the signet in Scotland may be admitted to practise as attorneys.¹¹ The Court has power to make rules for the examination of persons instructed in Gibraltar in the knowledge and practice of the law by any barrister, advocate, attorney, solicitor, or proctor,¹² but this power has not been exercised.

Gold Coast.—The Chief Justice may admit as barrister any barrister or advocate in Great Britain or Ireland; as solicitor, any solicitor or writer to the signet in Great Britain or Ireland¹³; but the two branches of the profession are not kept distinct.¹⁴ He may also admit as solicitor any person who has served for five years continuously with a practising barrister or solicitor residing within the jurisdiction of the Court and has passed an examination in the principles and practice of the law by an examiner appointed by the Chief Justice.¹⁵

Grenada.—The conditions of admission are the same as in the Gold Coast, except that the Attorney-General is associated with the Chief Justice in being responsible for the examination.¹⁶

¹ Legal Practitioners' Rules, 1901, Art. 4.

² *Ibid.* Art. 5.

³ No. 7 of 1875, s. 11.

⁴ No. 7 of 1909, s. 2.

⁵ Order lviii. of the Rules of the Supreme Court. Ordinances of the Gambia in force July 31, 1900, vol. ii. p. 221.

⁶ *Ibid.* Rule 7.

⁷ *Ibid.* Rule 4.

⁸ *Ibid.* Rule 5.

⁹ Ordinance No. 4 of 1902, s. 2.

¹⁰ Supreme Court Consolidation Order, 1888, s. 13.

¹¹ *Ibid.* s. 14.

¹² *Ibid.* s. 14.

¹³ Ordinance No. 4 of 1876, s. 53.

¹⁴ *Ibid.* s. 58.

¹⁵ *Ibid.* s. 55.

¹⁶ Ordinance No. 28 of 1896, ss. 41-3.

Hong-Kong.—The conditions of admission are similar to those in Grenada,¹ except that before being articled the pupil must pass a preliminary examination in general knowledge,² and the conduct of the preliminary and final examinations is entrusted to the Attorney-General and two other fit persons appointed by the Chief Justice.³ In the conduct of the examinations any point unprovided for by the regulations is to be governed by the practice as to solicitors in England.⁴ A portion of the period of service under articles may be with a solicitor in Great Britain or Ireland.⁵ An appeal from the unsuccessful candidate in an examination lies against the examiners to the Court.⁶

Jamaica.—*Barristers.*—The Bar Regulation Law, 1896,⁷ provided that the Governor, with the approval of the Judges of the Supreme Court, might arrange with the Board of Examiners of the Inns of Court (? Council of Legal Education) to conduct the examination of applicants for admission to the Jamaican Bar, and in the meantime arrangements were to be made for the judges to make the necessary arrangements for examining applicants.

Solicitors.—Any solicitor in England or Ireland, writer to the signet⁸ or law agent⁹ in Scotland may be admitted as a solicitor. The examination of solicitors is entrusted to a committee consisting of the Attorney-General, Crown Solicitor, and five practising solicitors appointed by the judges.¹⁰ Before being articled the pupil must pass a preliminary examination, during the period of his articles an intermediate, and at the end of the five years a final examination.¹¹ Holders of the degree of Bachelor of Arts or Law in the universities of Oxford, Cambridge, Dublin, Durham, or London, or Queen's University, Ireland, or the degree of Bachelor of Arts, Master of Arts, Bachelor of Law, or Doctor of Law in any of the universities of Scotland, are only required to serve three years.¹² Clerks to solicitors who have "faithfully, honestly, and diligently" served for ten years may be admitted as solicitors.¹³

Leeward Islands.—The full Court may admit as barristers any barrister or advocate in Great Britain or Ireland, any solicitor or writer to the signet as a solicitor,¹⁴ but the two branches of the profession are not kept distinct.¹⁵

Malta.—The Laws of Organisation and Civil Procedure promulgated by Ordinance No. 4 of 1854 contain the conditions of admission to the legal profession.¹⁶

¹ Ordinance No. 1 of 1871, ss. 20, 23, 26. Ordinances Revised 1904.

² *Ibid.* s. 3.

³ *Ibid.* s. 11.

⁴ *Ibid.* s. 12.

⁵ *Ibid.* s. 18.

⁶ *Ibid.* s. 14.

⁷ Law 39 of 1896.

⁸ Law 9 of 1869, s. 6.

⁹ Law 27 of 1893.

¹⁰ Law 36 of 1896, s. 4.]

¹¹ *Ibid.* s. 5 and Law 9 of 1869, s. 2.

¹² Law 36 of 1896, s. 10.

¹³ *Ibid.* s. 11.

¹⁴ Ordinance No. 8 of 1911, s. 17.

¹⁵ *Ibid.* s. 90.

¹⁶ The Edition of which use has been made was published in Malta, 1865.

Advocates.—Authority to practise as an advocate is derived from the Head of the Civil Government and granted by warrant under the seal of the local Government and the signature of the Chief Secretary to Government.¹ To obtain the warrant the applicant must be a natural born British subject of good character with a degree of Doctor of Law in the University of Malta. If, without a dispensation, he has taken the degree at another university the applicant must give "proof of a full knowledge of the language of the Courts and of the laws and customs of the island of Malta" before the examiners of the University of Malta. Whatever may be his academic qualification he must have been for not less than one year with an advocate and exercised himself in the practice of the profession, and also have given regular attendance at the sittings of the Court.²

Legal Procurators.—The method of admission is the same as for advocates. The applicant to be admitted as legal procurator must possess a standard of general knowledge before he can be admitted to the study of judicial procedure in the university. Before he can receive his warrant as Legal Procurator he must frequent the office of an advocate to exercise himself in the practice of the profession.³

Mauritius.—The two branches of the profession are quite distinct.⁴ Only barristers or advocates of one of the superior Courts of Great Britain or Ireland can practise as barristers in the island.⁵ Attorneys must have served six years' articulated clerkship, or five years if part of the time he has been articulated to a solicitor, writer to the signet, or law agent in Great Britain or Ireland. A graduate of Oxford, Cambridge, Dublin, Durham, or London, or any of the Scottish universities, may qualify in four years. But all, including any fully qualified solicitor, writer to the signet or law agent of Great Britain or Ireland, must pass an examination⁶ in three stages⁷ under the control of the judges of the Court.⁸ Barristers of five years' standing in the Colony may be disbarred and become solicitors on passing the final examination.⁹ Graduates in arts or law in any university in Great Britain or Ireland, or persons with a standard of knowledge equivalent to that necessary to matriculate, are exempt from the preliminary examination in general knowledge.¹⁰ Graduates in law at any university in Great Britain or Ireland, and all who have passed the examination in Roman Law for any such degree, are exempt from Roman Law in the intermediate examination.¹¹

Northern Nigeria.—The Chief Justice has powers similar to those of the Chief Magistrate of the Gambia¹² in regard to the admission of advocates, with the addition that the conditions are somewhat more defined for temporary

¹ Laws of Organisation and Civil Procedure, Lib. I. tit. vii. Art. 96.

² *Ibid.* Art. 98.

³ *Ibid.* Art. 103.

⁴ Rules of the Supreme Court. Rule 171. (*Laws of Mauritius*, vol. vi. p. 202.)

⁵ Rule 172.

⁶ Rule 174.

⁷ Rule 183.

⁸ Rule 184.

⁹ Rule 174 (iv).

¹⁰ Rule 185.

¹¹ Rule 186.

¹² See *supra*, p. 138.

admission.¹ The licence to practise is only granted for six months, and the applicant, besides producing full credentials as to his fitness of character, must pass an examination testing his general education and knowledge as well as his knowledge of the principles and practice of the law of England and of the Protectorate.²

Nyasaland.—Members of the Bar of England, Scotland or Ireland, solicitors of the Supreme Court in England or Ireland, writers to the signet and solicitors in Scotland, pleaders admitted to practise before one of the High Courts in India, members of the Bar of any British African Colony or possession, and such other persons as the Judge of the High Court may certify to be duly qualified by legal knowledge and character, may be admitted as pleaders.³

St. Lucia.—The Court shall admit to practise any member of the Bar,⁴ solicitor, or writer in the United Kingdom,⁵ and any person of full age who has served four years continuously in the chambers of a practising barrister and passed an examination in the principles and practice of the law prescribed by the judge.⁶ A barrister may practise also as advocate or proctor in the Vice-Admiralty Court, or a notary.⁷ The Court may admit to practise as a notary any person who has served four years continuously in the office of a practising notary.⁸

St. Vincent.—All English or Irish barristers or Scottish advocates are entitled to admission as barristers. If at any time the number of resident barristers is not sufficient for the satisfactory conduct of the business of the Courts, the Chief Justice may license any fit and proper person to be styled a "law agent" to appear in any particular proceedings.⁹ A barrister may act as a solicitor.

The Court may admit as a solicitor any solicitor of Great Britain or Ireland and any person who has served for three years in the office of a practising barrister or solicitor residing in the Colony after having passed "such examination touching the principles and practice of the law before such persons or in such manner as the Chief Justice may from time to time prescribe and appoint."¹⁰ A solicitor is not qualified to act as a barrister.¹¹

Sierra Leone.—The Chief Justice has power to admit as barristers any member of the Bars of Great Britain or Ireland or the Colonies, and as solicitors any solicitor or writer to the signet in Great Britain or Ireland.¹² He may also admit as solicitor any person who has served as an articulated pupil

¹ Order viii. Schedule to Supreme Court Ordinance, Laws, ed. by E. A. Speed, p. 31.

² *Ibid.* Order viii. Rule 4.

³ Rule 2 of the Nyasaland Legal Practitioner Rules, 1908.

⁴ Legal Practitioners Ordinance, 1888, Laws 1889, p. 375.

⁵ Ordinance No. 9 of 1898.

⁶ Legal Practitioners Ordinance, 1888, *ubi sup.* s. 3.

⁷ *Ibid.* s. 5.

⁸ *Ibid.* s. 7.

⁹ No. 1 of 1906.

¹⁰ Supreme Court Act, 1880, s. 26.

¹¹ *Ibid.* s. 27.

¹² Ordinance No. 14 of 1904, s. 49, Revised Ordinances, 1909, p. 778.

for three years and passed an examination to his satisfaction in the principles and practice of the law.¹ A discretion is also given to the Chief Justice to license temporarily fit and proper persons to act in the capacity of barristers, solicitors, and proctors if the supply is inadequate.² The two branches of the profession are not distinct.³

Southern Nigeria.—The Chief Justice has power to admit as barristers and solicitors in the Court any barristers or advocates admitted in Great Britain or Ireland, and solicitors or writers to the signet in any of the Courts at London or Edinburgh, with a discretion to him to refuse any one "upon due cause."⁴ Certificate of call or admission must be deposited with the Registrar of the Court unless the Chief Justice upon special grounds grants exemption from the formality.⁵ The Chief Justice may admit as a solicitor any person who has served continuously for five years in the office of a practising barrister or solicitor upon passing an examination touching the principles and practice of the law.⁶ In case there shall not be a sufficient number of barristers, solicitors, and proctors, the Chief Justice has power to admit temporarily fit persons under special rules of the Court.⁷

Southern Rhodesia.—Admission of legal practitioners is controlled by the High Court. Solicitors or attorneys in the Supreme Court of any British Colony or Possession are entitled to admission after having passed the examination in law and jurisprudence of the University of the Cape of Good Hope or an examination appointed to be equivalent by the Administrator and having served for three years as an articled clerk in the territory.⁸ Three years' service under articles in Great Britain or Ireland or the Cape of Good Hope, the examination in law and jurisprudence of the University of the Cape of Good Hope and an examination in the practice of the law under the auspices of the High Court, are also qualifications. Barristers in England, Ireland, or the Cape of Good Hope, and Scottish advocates are required to serve as articled clerks for twelve months in the territory before admission.⁹ The regulations also include provision for the admission of notaries¹⁰ and conveyancers.¹¹

Straits Settlements.—Any barrister or solicitor of England or Ireland, advocate, writer to the signet, or law agent of Scotland is entitled to admission to the practice of the law without examination unless, "having for any extended period ceased to practise in his profession, a further test of his professional knowledge is necessary or desirable."¹² Others may obtain

¹ Ordinance No. 14 of 1904, s. 51.

² *Ibid.* s. 53.

³ *Ibid.* s. 54.

⁴ Ordinance 4 of 1876, s. 71.

⁵ *Ibid.* s. 72.

⁶ *Laws of the Colony*, 1908, vol. i. p. 33.

⁷ Ordinance 4 of 1876, s. 74, and for special rules see *Laws of the Colony*, 1908, vol. i. pp. 50-1.

⁸ Legal Practitioners Regulations, 1895, s. 1 (1); Statute Law of Southern Rhodesia, 1899, p. 363.

⁹ *Ibid.* s. 1.

¹⁰ *Ibid.* s. 4.

¹¹ *Ibid.* s. 6, and Ordinance No. 11 of 1908, s. 20.

¹² Ordinance 30 of 1907, s. 90.

admission to the profession by serving a period of articles of clerkship after passing a preliminary examination in general knowledge under the direction of the Court.¹ The period is five years,² and at the end an examination must be passed in Legal History, Principles of Law of Real and Personal Property, and the practice of Conveyancing, Contracts and Torts, Civil and Criminal Procedure, Criminal Law and the Law of Evidence, Equity Trusts and Easements, and the law and practice of Bankruptcy.³ The examiners thereupon certify as to the fitness of the candidate to the Court,⁴ and if satisfactory he will be admitted as an advocate and solicitor upon completion of the necessary formalities.⁵

Trinidad and Tobago.—*Solicitors.* Bachelors of Arts or Laws of any University in England, Wales, or Ireland, Masters of Arts, Bachelors or Doctors of Laws of any Scottish University, English or Irish barristers or Scottish advocates may be admitted as solicitors after serving articles for three years.⁶ Clerks who have passed the Oxford or Cambridge Senior Local in the first class in honours—an equivalent are admitted after serving four years.⁷ Other persons without those qualifications are admitted by passing a preliminary examination in general knowledge as prescribed by the Judges of the Supreme Court and the Principals of the Royal College and St. Mary's College,⁸ and intermediate and final examinations under the direction of the Law Society.⁹ Clerks of ten years' standing may be admitted after being articulated for three years.¹⁰ "Every barrister-at-law duly admitted to practise in this Colony if resident and actually practising in Tobago, but not otherwise, may without passing any examination . . . be admitted by the Court to practise as a solicitor in Tobago," subject to the same privileges and liabilities as a solicitor.¹¹

Turks and Caicos Islands.—No person shall be admitted to practise as a solicitor unless he has been called to the Bar or duly admitted to practise in some part of the British Empire, or has been articulated for five years, when he will be required to satisfy the judge of his fitness for admission.¹²

Uganda.—The following are entitled to practise before the High Court: Members of the Bar of England, Scotland, or Ireland, solicitors of the Supreme Court in England or Ireland, writers to the signet and law agents in Scotland, pleaders admitted to practise before one of the High Courts of India, and native vakils.¹³ If in the opinion of the judge the number of pleaders is insufficient for the public requirements in any Court, he may, in his discretion, admit other persons of good character and sufficient

¹ Ordinance 30 of 1907, s. 94.

² *Ibid.* s. 102.

³ *Ibid.* s. 103.

⁴ Ordinance No. 29 of 1912, ss. 8 (1) (2), 3.

⁵ *Ibid.* s. 2.

⁶ *Ibid.* ss. 3, 2.

⁷ *Ibid.* s. 4.

⁸ *Ibid.* s. 34.

⁹ Ordinance No. 5 of 1903, s. 25. Laws Revised, 1908, p. 615.

¹⁰ Laws of the Uganda Protectorate, 1910, p. 12.

¹¹ *Ibid.* s. 93.

¹² *Ibid.* s. 107.

¹³ *Ibid.* s. 3.

ability in that Court, but only to be licensed to practise during the pleasure of the judge.¹

Zanzibar.—No person is admitted to practise as a legal practitioner unless he is a barrister or solicitor, pleader before one of the High Courts of India, or a native vakil who has obtained a certificate from the Sultan and has satisfied the magistrate that he has an adequate knowledge of the law and rules of procedure of the Courts.²

¹ S. 4, Laws of the Uganda Protectorate, 1910, p. 13.

² Rule 46 of the Rules, dated April 21, 1909, and made under s. 40 of the Zanzibar Courts Decree, 1908.

THE ELEMENTAL FUNCTIONS OF GOVERNMENT.

[Contributed by W. W. LUCAS, ESQ.]

No classification of the functions of government in the abstract has ever been made. Names have been attached to its concrete activities, and these activities have been connected together under larger titles. Usually the concrete activities of government have been divided into legislative and executive. Some writers have divided them into legislative, executive, and judicial. Occasionally, a fourth has been added, namely the financial. In drafting the constitutions of the Dominion of Canada and the Commonwealth of Australia these four activities are recognised and are separately treated.

Locke (*Civil Govt.* chap. xii.) also speaks of a "federative" power, *i.e.* the power to enter into relations with other nations, whilst Montesquieu speaks of two "executives," one for home affairs and the other to deal with foreign relations. For juristic or constitutional exposition it does not matter very greatly what method of classification text-writers adopt, as the object is simply to describe the working of government. Some writers devote themselves to a study of the chief "ends" of government (see Locke, *Civil Govt.* chap. ix.); some study the distribution of powers; others divide according to the offices or departments actually in vogue. The aim of them all is to describe as lucidly as possible how the government of the country is carried on. There is, however, one other way in which the subject may be approached, and that is to obtain a division into elementary functions, in order, if possible, to secure a permanent classification which can and will exist independently of all political considerations and all the variable dispositions of governmental authority. To these elemental functions, if they can be discovered, all powers and duties can be co-related. Such a classification would of course be most impracticable for text-books on the constitution, as practice would be found to diverge so much from these functions as to make the task of co-relating them in the mind of the student too complicated and unprofitable. The absolute is always impracticable, whether in philosophy or science, and, as Sir Frederick Pollock has observed, the masterly arrangement by Aristotle in his *Politics*, iv. 14, is merely a convenient description of the working of government as Aristotle saw it around him.

The present writer, in studying the legal position of the Crown, as distinguished from its constitutional position, has, however, regretfully found that the conventional classifications throw no light upon the status of the Crown under statute law or in the Courts. The division into legislative and executive is not a satisfactory one, as these duties do not co-relate with any known canons of obligation or immunity. "Legislative" work includes, besides Acts of Parliament, customary law and also numerous laws that trace their origin to judicial decisions, and of the administrative rules and regulations made outside Parliament it apparently includes the more important Orders-in-Council, four species of legislation and four sets of legislators, all, or at least three of them, differing more or less in authority and obligation.

The expression "executive" is made to include the lesser administrative regulations and also all purely ministerial work, whether carried out in obedience to statute law or to administrative order. The former is a discretionary duty, and the latter is a simple act of obedience, giving two entirely different degrees of obligation. They may each plead the prerogative defences, where available, but the former has also a second defence, viz. its own discretion.

Prof. Salmond (*Jurisprudence*, 130) observes that the executive, the essential function of which is to conduct the administrative departments of state, possesses also certain subordinate legislative powers delegated by Parliament or arising at common law. According to Prof. Salmond, therefore, the distinction between the legislative and executive work is a confused one, for he attributes, and rightly so, "legislative" powers to the executive.

President Lowell adopts the division of powers into legislative and executive (*Govt. of England*, i. 23, 24), but he is not altogether happy about Orders-in-Council. He attributes plenary executive authority to the Crown, but distinguishes Orders-in-Council as being made by the Crown in Council and not by the Crown alone. But surely the Crown in Council is the very embodiment of executive authority.

The division into legislative and executive powers, though almost universally adopted, is also open to another objection. It has satisfied neither the jurist nor the constitutionist. Bentham considers it fallacious (Bentham's *Works*, iii. 198), for he says that political powers cannot rightly be classified under those headings, and he declares that no two persons entertain the same notion as to the extent of the powers belonging to each. Bentham also asserts that there is a natural connection between the conditions of science and the conditions of its nomenclature. Indeed with badly arranged nomenclature it is impossible to reason correctly, because it means either badly arranged ideas or perpetual strife between language and thoughts.

Sir Henry Maine is dissatisfied with the historical theories commonly

accepted by English lawyers, and he says that next to a new history of law, what is most required is a new philosophy (*Early History of Institutions*, 342).

Austin, though a highly scientific jurist, made no attempt to ascertain the fundamental functions of government but accepted the division into legislative and executive. He himself, however, admits that the arrangement is far from approaching precision, and he is so dissatisfied with it that he suggests, as a more accurate one, the division of political powers into supreme and subordinate, which is certainly not very informing. That we shall find Austin's arrangement hopeless as a key to the legal status of the Crown is only to be expected, for he actually denies that a king or a sovereign body corporate has any legal status at all. Prof. Holland (*Jurisprudence*, 370) separates legislation from executive government, and then adds what he calls a residue of "administrative law," which he describes in some detail.

Prof. Harrison Moore also recognises the division into legislative and executive in his work on the *Constitution of Australia*, 2nd ed., but at pp. 293, 294, he admits that the term "executive" is not a correct one, though he seems quite at a loss to explain the reason. The reason is that the working arrangements of government do not lend themselves to accurate classification, because they are practical and not scientific, the fundamental functions of government being crossed and linked to suit the needs of society and not to facilitate the work of arranging ideas.

If the conventional arrangement does not satisfy the constitutionists who are responsible for it, how can it satisfy those who have to investigate in a legal sphere where all looseness and makeshift are anathema? It is better in the legal sphere to have a classification which is academic and even remote, provided it be accurate, and capable of being readily co-related to existing facts. No doubt a proper application of prerogative law will fully disclose the legal position of the Crown under all circumstances without any guiding theories, but the subject is such a wide one that the assistance of one or two clear leading principles should tend to simplify the undertaking. The alternative classification which the writer would suggest has for its leading ideas the following three activities of government: (1) the power to create or originate law, (2) the power to administer law, and (3) the obligation to carry it out. No. 1 is the work of the "Common Consent" which alone has the power to create rights and wrongs. It does its work by establishing custom and passing Acts of Parliament. No. 2 is a purely discretionary function operating within the limits conceded or prescribed by the Common Consent. It embraces all so-called legislative and executive work done by the Crown (including, of course, the Crown in Council), but excludes that purely ministerial action which carries the laws and orders out. No. 3 is easy to describe and comprehend, but difficult to separate from Nos. 1 and 2 for the simple reason that no systematic attempt has ever been made to separate it, neither has it ever been set forth as a distinct and self-contained

function. It consists in the duty of obedience to command whether that command be contained in Act of Parliament or in administrative order. These three the writer conceives to be the fundamental functions of government, and for the following reason, that the measure of authority and the measure of immunity differ in each case, which is the most important of all distinctions for legal purposes. The Common Consent or the nation at large possesses unlimited authority and incurs no liability; the discretionary function possesses a limited authority, and may incur a corresponding liability by exceeding or abusing that authority; and the ministerial function possesses no independent authority, acting under the authority of (1) and (2), and it incurs unlimited obligation. It is true that both (2) and (3), which constitute respectively the thought and action of the Crown, can plead in the Courts that the Crown can do no wrong. Nevertheless Crown Office procedure is available whenever there is an absolute duty to perform, and so, in certain cases, is the procedure following a Petition of Right. A mandamus will always issue to command the performance of a statutory ministerial duty. It could also issue in respect of the ministerial duty prescribed by a discretionary Crown body, but the Courts do not allow a mandamus in the latter case, because the department or officer exercising the discretion can revoke the duty: see Nathan's case, *R. v. Inland Revenue Commissioners*, 1884, 12 Q.B.D. 461.

The distinction between the ministerial duty and a discretionary authority may be seen in many of the cases. In *R. v. Powell*, 1841, 1 Q.B. 352, an application was made for a mandamus against the steward of a Crown manor who had refused to admit a suitor. Lord Denman said (*ibid.* 361) that the advisers of the Crown might, if they were of opinion that its interests might be affected, *advise* the Sovereign to either *order* a steward not to *admit* the prosecutor of the mandamus or to revoke the appointment of the steward. Here are three distinct acts, the advising, the ordering, and the admitting or refusal to admit. The two functions are clearly revealed, namely, the administrative discretion and the ministerial duty. In *R. v. Local Government Board, ex p. Kingstown Commissioners*, 16 L.R. Ir. at 157, Palles C.B. explicitly recognises the distinction between the ministerial and the discretionary acts of a public department. In the *Commissioners for Special Purposes of Income Tax v. Pemsel*, 1891, A.C. 539, we find a ministerial officer with a duty prescribed by Parliament. Lord Halsbury declared, at the page mentioned, that when a statutory duty is imposed in peremptory terms upon an official, the Court would issue a mandamus to compel its performance. It would be quite easy by examining Acts of Parliament and legal decisions relating to the Crown to show that the distinction between the discretionary authority and a ministerial duty is the true fundamental distinction to draw for legal purposes. The latter makes the Crown accessible in the Courts, and, incidentally, provides a legal status.

Nearly every constitutional writer indicates the existence of such a distinction, but only to accord it a passing reference. Hallam perhaps gives prominence to both ideas when he uses the expression "executive administration," *Hist. Eng.* iii. 294.

Prof. Salmond (*Jurisprudence*, 2nd ed. 475-6) recognises the necessity of a ministerial function as a distinct feature of government. On p. 11 he declares that compulsion must be added to the interpretation as well as to the administration of law, which means that both lay and juridical administrators must have ministerial agents to carry out their decisions.

Prof. Holland in his reference to executive *powers* and administrative *law* seems to hint at the distinction between ministerial and administrative work. Hearn (*Govt. of England*, 119) quotes Hale as saying that in Parliament the King has a plenitude of power as well legislative as deliberative and executive, or power of jurisdiction in its full comprehension. (See Jurisdiction of House of Lords, 9.) The King in Parliament here means supreme authority, which Hale divides into legislative, deliberative, and executive duties. These are somewhat similar in idea, although different in terminology to the three fundamental functions of government, the creative, administrative or discretionary, and the ministerial. Austin (*Jurisprudence*, i. 73) recognises the distinction between the administrative and ministerial functions when he says that administrative law determines the ends and modes to and in which the sovereign power shall be exercised.

The writer fully realises that the distinction which he has drawn in thus grading the functions of government in order to arrange them according to the measure of authority and of obligation attached to each may seem fanciful to some, who might prefer the conventional division into legislative and executive duties, with all its admitted imperfections. He has, however, thoroughly tested his classification, and is fully convinced that it is thoroughly scientific, and, what is more important, it is a good test to apply in order readily to ascertain the legal position of the Crown in the Courts.

NOTES.

Comparative Law in Blue Books.—*Dominions Report.*—More than half of the Report for the year 1911-12 (Cd. 6091, 11d.) deals with the legislation of the Dominions. A summary is given of the more important Acts upon lines which have been made familiar to readers of this Journal in the annual review of legislation. The full text is printed of the two Defence Acts passed by the Commonwealth of Australia in 1911, of the New Zealand Shipping and Seamen Amendment Act, No. 37 of 1911, of the Union of South Africa Defence Bill and the Transvaal Province Education Act (Language) Amendment Ordinance.

Commercial Arbitration Awards.—Information as to the enforcement abroad of awards given in arbitration on commercial matters in the United Kingdom between British and foreign traders was laid before the Imperial Conference.¹ Fuller particulars from the replies collected from the Dominion Governments and the British Embassies are published in a separate Blue Book (Cd. 6126, 4d.) issued by the Board of Trade. Some of the statements, however, probably require revision, as they were prepared three or four years ago.

Preservation of Ancient Monuments.—A White Paper (Cd. 6200, 3d.) containing reports from His Majesty's representatives showing the systems adopted in certain foreign countries for the preservation of ancient monuments adds little to the article by Prof. Baldwin Brown in the last number of Journal,² and, as usual, is presented without literary form. There is an interesting report derived from observations by Dr. Hager, the Director of the General Conservatorium, as to what is being done in Bavaria. The organisation is based upon an extensive system of local correspondents. Reference is made to the regulations which deal with old as well as new buildings. They cover even old castles in the country. One local bye-law, as it would be called in England, forbids the use of black tiles for roofing purposes, and makes the employment of red tiles obligatory, "so as not to interfere with the beauty of the landscape by the erection of differently-coloured roofs." The White Paper also contains the uniform rules and regulations prescribed by the Secretaries of the Interior, Agriculture, and War of the United States in respect to ruins, archæological sites, historic and prehistoric monuments and structures, objects of antiquity, historic landmarks, and other objects of historic or scientific interest.

¹ See Journal, vol. xii. p. 542.

² *Ibid.* pp. 266 *et seq.*

The Australian Commonwealth Court of Arbitration.—We have received a report of decisions in the Australian Commonwealth Court of Conciliation and Arbitration. Two features are common to all the decisions—the minute details into which the awards enter and the immense scope of the awards. The President of the Court makes certain remarks which are worth quoting: “In ordinary litigation two or three parties only are concerned—here there are hundreds; and any award or judgment has many consequences in our complex society. In ordinary litigation the more learned the disquisitions of law the more unintelligible and the more uninteresting they become to the public. None outside and few initiates dare to penetrate the lofty and inaccessible temple in which they are stored. But in this jurisdiction one has to deal with matters of ordinary life and industry, and to make pronouncements which thousands understand and (as I have reason to believe) feel competent to criticise.” It is scarcely too much to say that in such a tribunal the rights of persons not before it are practically decided, and upon grounds necessarily vague.

Native Customs in East Africa.—Mr. R. W. Hamilton has earned the thanks of all persons interested in primitive law and custom by the collection of “Native Laws and Customs of East Africa” which he has appended to his excellent series of *Law Reports*. The new volume (vol. iii.) contains a further instalment, adding to and supplementing those which have gone before. We give the Appendix in full:

AKAMBA.

The information previously recorded as to the laws and customs of this tribe was derived chiefly from the Akamba in the neighbourhood of Machakos. That these are subject to variations among the Akamba of Kitui and the peoples of Mumoni and Thaaka is shown by the following notes.

KITUI CUSTOMS.

The law is administered by the elders who form the Nzama Council. Their orders are absolute.

The only death sentence is by “Kingole,” a kind of lynch law applied in the case of habitual offenders. The sentence by “Kingole” is decided upon by members of the Nzamas from districts lying some distance from that in which the offender lives.

Kikamba Oaths.—There are many forms of trial by ordeal, but the nearest approach to an oath taken by the Mkamba is “Kithito.” A man swearing falsely by “Kithito” is supposed to die, but once he has taken the oath his statements are believed unless he dies in consequence of the “Kithito.” A simpler form of oath is the stepping over a stick while the person says, “May I break my leg if I lie.

Murder (Homicide), except by accident, is compensated with:

In the case of a man, 14 cows, 1 bull.

In the case of a woman, 7 cows, 1 bull.

In the case of a child, formerly 6 cows, 1 bull, according to sex the same

Accidental Homicide (Mbanga) is compensated by payment of:

For a man, 7 cows and 1 bull.

For a woman, 4 cows and 1 bull.

For a child, same according to sex.

Theft.—Property stolen returned, and 1 bull paid. In the case of honey-barrel stealing or habitual stealing Kingole was applied.

Injuries (Intentional and Accidental):

Loss of fingers, 1 bull and 1 cow for each finger.

Loss of toes, 1 bull and 1 goat for each toe.

Loss of leg or arm, 7 cows and 1 bull.

Loss of both legs or arms, 14 cows and 1 bull.

For breaking arm or leg, 1 cow and 1 bull.

For loss of one ear, 5 goats (2 goats if accidental).

For tearing one ear, 1 goat.

For loss of one eye, 1 cow and 1 bull.

For loss of both eyes, 14 cows and 1 bull.

For loss of teeth, 1 goat (if accidentally, a pot of tembo).

For loss of nose, 1 cow and 1 bull.

For loss of one testicle, 4 cows and 2 bulls.

For loss of both testicles, 14 cows and 1 bull.

For loss of penis, 14 cows and 1 bull.

Adultery.—This is compensated by 1 bull and 1 goat. A man seeing another having connection with his wife used formerly to be allowed to kill him, or the offender would pay a large bull valued as 1 cow. If the woman becomes pregnant, the child goes to her husband, and the offender pays 1 bull and 1 goat. If the child dies before compensation is paid, 2 bulls and 2 goats are paid. If the woman dies, blood-money is paid.

Rape.—Same as adultery, except that the bull must be a large one valued equal to a cow, and that the goat must also be a large one termed "Masai."

Offences committed by persons in a state of intoxication are punished as if the men were sober. Offences by children or persons of unsound mind are compensated by payment from their relatives. An exception to these rules is made in the case of murder or injury done to a person by another of the same village or family, in which case half the compensation is paid, as, for instance, 7 cows and 1 bull in the case of murder.

Marriage.—The ordinary price for a wife is 3 cows and 2 bulls. The father may take back his child at any time, and return dowry paid. Claims for dowry include all presents given.

If a woman runs away from her husband he may either claim dowry paid or he may claim the children and leave the dowry, in which case he also claims all the children which the woman may subsequently have. If he claims dowry he may also claim all the calves of his cows paid, no matter whom they have been given or sold to. If any of the cattle paid die, the skin and the meat are returned to the owner, or if the meat is not given, the haunches of a goat are reckoned as equivalent; such cattle are reckoned as returned when dowry is reclaimed on the woman leaving her husband.

Inheritance.—Cattle and goats go to the eldest son, who divides them among himself and brothers under supervision of an uncle. If there are no sons, the stock goes to a brother or next of kin or clan.

During his life a man gives each wife a portion of the cattle. The eldest son then gives each one a portion of the cattle from each hut and retains a portion himself, and the whole of the cattle of his mother's hut. If the cattle are not numerous enough to supply each son, they are kept until they increase, and wives are bought

in succession for each son by the increase. If a man inherits girls with his mother, and sells them in marriage, he will buy a wife for his brother, if the latter has no cattle, but the cattle are repaid after.

Wives.—The elder wives go to the brother, and the younger wives to the eldest son, who receives them from his uncle. The wives cannot be sold again, but may be given to another man, though not as his wife altogether, and if they have issue the child belongs to the son or brother as the case may be, but if the woman runs away to a third man, the brother or son will claim dowry. Children follow the wives.

Authorities.—Maingi wa Kitetu; Musangi wa Kalungu; Kuma wa Nduse; Mahungo wa Mwathi; Ndibo wa Etummo.

(C. DUNDAS.)

THAACA CUSTOMS.

(These refer to the Thaaka people on Kitui side of the Tana River.)

The Nzama or Council exists as among the Akamba, but there is no death sentence answering to the "Kingole." A man refusing the orders of the Nzama is beaten and pays one bull to the elders.

Murder is punished by payment of compensation, which is:

For a man, 60 goats.

For a woman, 40 goats.

For a child, the same, according to sex.

No difference is made for accidental killing, compensation being the same as in murder.

Adultery.—Three goats. If there is issue, no further compensation is paid, but the child goes to the husband. If the child dies before compensation is paid, 40 goats are paid in the case of a male child, and 28 for a female child. If the three goats have been paid before the child dies no further compensation is paid.

Rape.—Seven goats, but if there is issue, 14 goats are paid. If the child dies, 40 goats are paid for a male child, and 28 for a female child.

Injury.—Loss of one finger, 7 goats.

Loss of one eye, 7 goats.

Loss of one toe, 7 goats.

Loss of one leg, 21 goats.

Loss of one arm, 21 goats.

Marriage.—Dowry is 28 goats. The father or brother can take back the wife at any time and return all dowry paid. If the wife leaves her husband of her own accord, the husband can keep the children, but has no claim on those subsequently born. In claiming dowry, all the young ones of his goats are included in the claim.

Inheritance.—All property is divided among the sons equally, except that the eldest son takes one of each animal more than the younger sons.

Wives go to the eldest son, but he may not sell them or claim dowry if one goes to another man; he may give his father's wives to other members of his clan.

Authorities.—Mundu wa Ngala; Kiviuvu; Poeboi.

(C. DUNDAS.)

MUMONI CUSTOMS.

Marriage.—Formerly up to 10 cows were paid, but now it has been reduced. In Mumoni it has always been dearer than in Kitui, and now if a man pays 3 cows and 2 bulls (as in Kitui) he is poor. As a rule it will be up to 5 cows with a well-to-do man.

Blood-money (Homicide):

For a man, 12 cows and 1 bull, formerly 14 cows and 1 bull.

For a woman, 7 cows and 1 bull.

Accidental Homicide (Mbanga):

For a man, 12 cows and 1 bull.

For a woman, the amount of marriage dowry.

Children, paid as per sex.

Injuries:

Loss of one finger, 1 cow and 1 bull, and each subsequent one 1 cow and 1 bull.

Loss of one ear, 1 cow and 1 bull, and each subsequent one 1 cow and 1 bull.

Loss of one ear, 10 goats.

Tearing ear, 1 goat.

Loss of a leg, 7 cows and 1 bull.

Breakage of a leg above the knee—if the leg recovers, 2 cows and 1 bull. If the leg is crippled, 7 cows and 1 bull.

Breakage below the knee is said to be fatal, and man dies of it.

Adultery.—One large bull or 2 bulls and 1 large goat and 1 keg honey. No increase in case the woman becomes pregnant, excepting 1 goat as a sacrifice. If the woman dies in child-birth, 7 cows, 1 bull, and 10 goats.

Rape.—Formerly an offender was killed by the husband, but now same as adultery.

For killing a man in adultery or rape, the same blood-money was required.

Issue goes to husband of woman.

Theft.—Seven goats and return of the stolen property.

Theft of Honey-barrels.—Seven goats each barrel, so long as the thief was found in the tree, even before theft committed; but "Kingole" was usually applied on third offence.

"Kingole."—Same as in Kitui.

Authorities.—Mutia wa Kithunga; Mutia wa Kavandi; Mutui wa Ndei.

(C. DUNDAS.)

WAGIRIAMA.

To the notes on Giriama marriage appearing on pp. 100, 101 of Vol. I. should be added the following:

If a woman leaves her husband and returns to her father's house, the father need not pay back the Mahunda to the husband until the woman has been provided with another husband. And if the woman, in the meantime, without being remarried has a child, such child belongs to the original husband, whoever may have been its actual father.

(H. R. MONTGOMERY.)

GALLA.

The punishment for trespassing in the house of another is the payment of one bull in compensation. In a case of common assault a like punishment may be awarded. (High Court Crim. Case 18, 1910.)

AKIKUYU.

In the High Court Criminal Case 19, 1911, where an Mkikuyu was found to have accidentally killed one of his father's wives, not being his own mother, it was held by the assessors that he was bound by the custom of the tribe to obtain for his father another wife in the place of the woman he had killed.

In the High Court confirmation Case 91, 1911, a conviction by the District Commissioner, Nyeri, was upheld in a case in which he had sentenced certain

Wakikuyu warriors on a charge of rape for having forcibly taken two unmarried girls and compelled them against their will to sleep in the warrior's quarters.

The existence of the custom of unmarried girls to cohabit with the warriors was admitted, but it was established also that such cohabitation cannot take place without a girl's consent.

A Year-Book of International Law.—We have received the *Jahrbuch für den internationalen Rechtsverkehr* for 1912-13; a remarkably rich collection of papers edited by Dr. Wertheimer, assisted by many eminent jurists. Some of the papers are elaborate studies, and all of them maintain a high standard of treatment. In reading this volume one cannot but regret that there is no similar publication for England. Naturally the *Jahrbuch* is compiled with an eye to the requirements and interests of German readers; but it will be useful to every student of international law. To the volume Professor Meili contributes an interesting paper on "Das moderne Recht und Geschäftsleben," which shows that jurisprudence has not kept pace with material and economic changes, and which indicates the kind of work which must be taken in hand. When will an English lawyer give us such a volume as this?

A Code for Domestic Servants by the Austrian Parliament.—Master and servant, mistress and maid have now got their code in Vienna. A domestic servant means a domestic worker who renders services of a menial character in the house or farm of the employer in return for payment and board and lodging. It includes children's nurses. The terms of the contract of service are left to the discretion of the parties; but whatever it is, the domestic worker must perform his or her duties under it "exactly in accordance with the employer's orders." In particular it will be good news for the Viennese master or mistress that a domestic, though only engaged to do certain work, may be called upon to do another domestic's work on an emergency. This would settle a long-standing servant grievance in England. On Sundays, all ordinary work is to be done, but attendance at church is not to be prevented. A domestic is not to leave the house unless on behalf of her employer, or stay out beyond the time allowed, or receive visits from "certain persons"—does this mean the soldier or policeman?—if against orders; but the domestic must be allowed "a certain time for the purpose of recreation and attending to his or her own affairs." This by itself is rather vague, but a little later it appears that the time for recreation is to be seven consecutive hours every other week, on Sundays or holidays if possible.

Where things are lost the employer may search the belongings of the domestic, but in the presence of the domestic and two witnesses.

Wages are to be paid at the end of every month. There is a large category (12) of grounds for discharge without notice, including the "libelling or slandering of the employer and his family" and "carelessly handling fire and light in spite of previous warnings": while the domestic has his

grounds (7) for leaving without notice, *inter alia*, if "the board is insufficient, or the lodgings detrimental to health and morals." If a domestic is ill the employer is bound to take care of him or her for a period not exceeding four weeks.

Every domestic is to have a service book recording the periods of service, etc., and certified by the police authorities. Why should we not have our own Domestic Code of Service, compactly summarising the law as to wages, dismissal, holidays, illness, insurance, and a dozen other little incidents of service? These are things which "come home to our business and bosoms," and go far in their present state of uncertainty to destroy the householder's peace of mind.

Frauds on Minorities of Shareholders.—When persons join a company they must be taken to assent to a majority of the shareholders' ruling. No business could be carried on unless that principle was maintained; but this necessary *modus vivendi* will not justify the majority in committing a fraud on the minority. That is well recognised in English law. None of the English cases, however, furnish so apt an example of what a majority may not do, and where a minority may fairly rebel, as a recent New South Wales case, *Miles v. The Sydney Meat Preserving Co., Ltd.* (12 *State Reports*, 98). The company there was formed for the sale of preserved meat, fish, vegetables, etc. The greater part of the shareholders were graziers, and what the directors, supported by a large majority of the shareholders, were doing was to convert the company practically into a graziers' protection society; that is to say, instead of carrying on the business so as to make profits by dealing in meat and other animal products and distributing these profits in dividends, they applied them to keep up the price of stock—their *modus operandi* being to give prices at auction sales of stock above those at which they might have purchased and thereby benefit the grazier shareholders in the concern. This was a clear fraud on the non-grazier minority. It was argued that it was a mere question of internal administration in which the majority had a right to control the policy of the company; but it was far more than that. The directors, as Simpson C.J. said, were not carrying out the purposes for which the company was formed, but were using the machinery and property of the company for purposes of an entirely different nature—to keep up the price of stock in the interests of the grazier majority, disregarding the making of profits altogether. And this no directors, even though backed by a majority of shareholders, can do. The powers given to directors by the constitution of a company, as Wickens V.C. long ago pointed out in *Pickering v. Stephenson*, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association. "This," said the Vice-Chancellor, "is not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence."

Increasing Diversity in Private International Law.—One fact which came to light in the meeting at the end of August of the Institut de Droit International at Christiania was the growing divergence at several points between Anglo-American and Continental jurisprudence. The various Conferences at the Hague on the subject of private international law, which England did not attend, have tended to widen the breach. Our representatives in the second Conference at the Hague on the subject of bills of exchange could not come to an agreement with the Continental representatives, who settled their differences, and in effect agreed to a uniform law throughout the Continent. In the interesting discussion which took place at Christiania on a report by M. Diena on "*Conflits de Lois en Matière de Droits réels en cas de Faillite*," the English members could not usefully take part. The reasoning in the paper and the resolutions proposed by him were based upon the principle of the unity and universality of bankruptcy, a principle not fully admitted in English law.

German Law and where to find it.—This is the burden, though not the title, of a most useful work, admirably designed and ably executed by Mr. E. Bornhard, Law Librarian of the Library of Congress, and forming the first of an intended series of Guides to Foreign Law. It is a recognition of the awakening interest of the nations in each other's laws and institutions, due to travel and increasing intercourse—an interest which is no longer a merely academic one for the jurist. The practitioner nowadays is met at every turn with points of foreign law or practice; and the legislator, if he is to do his work properly, must have the experiments of other nations before him. The first place in the series has been given to German law in virtue of the splendid work which Germany has done, and is doing, for research in the domain of legal science and in solving the social and economic problems of the day. It must not be supposed that the book, though it deals mainly with legal literature in Germany, is a mere bibliography. It is that, but a great deal more: it is a survey of legislation, of law reports, of jurisprudence, of legal history, of legal education, of the philosophy of the law in Germany—in a word, of legal thought in that country. The German Civil Code—which Maitland described as "the most carefully considered statement of a nation's laws that the world has ever seen"—its history and its substance, are fully summarised. Then comes commercial law in Germany, its history, literature, and provisions, including bankruptcy and trusts. Social insurance and labour laws, in view of their modern importance, are the subject of a separate section. Next follow criminal law and an account of the different schools of criminal law reform now active in Germany, with their literature. This forms one of the most interesting portions of the work, the reform of criminal law having been the focus of interest in legal circles in Germany for some years past. Court Procedure, Costs and Fees, and the Bar in Germany also come in for notice, and there is a useful glossary of German legal terms.

Nothing could, in fact, better fulfil the aim of the authors of this scheme,

to make this Series of Guides a library of comparative law, than the present volume. The practitioner will prize it as a short cut to find his law, and the scientific lawyer will prize it as a valuable survey of the whole domain of German law, revealing an industry and a wealth of legal literature in Germany which may well excite his admiration.

The Publication of Treaties.—Until lately in most countries the texts of recent treaties were practically inaccessible to most persons. They had to wait until the treaties were published, somewhat tardily, in one or two well-known collections. All this is being changed. Almost every country is taking steps to publish promptly an authoritative edition of its treaties. Among the handiest is the recently published *Recueil des Traités de la Norvège*, which includes all treaties in force with the exception of postal, telegraphic, and telephone conventions. What is possible, and indeed easy, for Norway is difficult in the case of older States with many complex relations. But it seems a pity that we cannot have for this country an edition of treaties somewhat similar to the revised statutes—the obsolete matter weeded out.

"The Commercial Laws of the World."—This work is a striking object-lesson in the history of law. The customs of merchants—the *Lex Mercatoria*—which had their origin in the market laws of the great fairs of the middle ages or in collections of maritime rules such as Olerson's, have here grown into a vast body of commercial laws and usages which not fifteen massive volumes can contain. The mustard seed is become a veritable tree overshadowing the whole earth. It has grown, in fact, with the commerce of the nations—and here peculiarly, in the centre of the commercial life of the world, the merchant, the banker and the business man with interests in every quarter of the globe needs to know what is the law that safeguards those interests in strange lands, and how, if necessary, he can vindicate his rights.

Take the illustration given by Sir Thomas Scrutton of a German ship chartered by an Englishman to load cotton in Egypt under bills of lading executed there and deliver it in Antwerp, putting in on its way into a Spanish port in distress. How such a situation bristles with points, and how helpless in the face of them an English lawyer feels himself without the aid afforded by such a work as *The Commercial Laws of the World*.

The latest volume deals in Part I. with the Isle of Man, the Channel Islands, Gibraltar and Malta : but the bulk of the volume is devoted to South Africa (the Union of South Africa—Cape Colony, Natal, the Transvaal, and the Orange Free State). In an admirable introduction Professor Lee has sketched the Political and Constitutional History and the Legal History of the Union. The law of South Africa, he points out, is in a state of transition. There is indeed as yet no law of South Africa, only the several legal systems of several provinces more or less in accord, more or less diverse ; but assimilation is proceeding. Differences, whether legislative or judicial, will, he thinks, under the influence of the Union rapidly disappear, and those institutions of each province which have been found by experience to be best adapted to

the needs of a progressive commonwealth will shortly prevail throughout the whole of the Union of South Africa.

Leaving South Africa, we take up the tale of the Sudan, of Somaliland, of East Africa Protectorate, of Zanzibar, of Uganda, of Northern Rhodesia, of Nyasaland, of Gambia, of Sierra Leone, of the Gold Coast, of Ashanti, and of Northern and Southern Nigeria. All these places are now, as Mr. Lewis Harcourt has recently pointed out, becoming centres of commercial activity; and as they do, and trade flourishes, the business man will learn more and more to appreciate the information collected for him in these invaluable volumes of *The Commercial Laws of the World*.

Malicious Prosecution in South Africa.—The Editors are indebted to Professor Lee for the following interesting note:

“The *South African Law Journal*, for many years ably edited by Mr. W. H. S. Bell, affords interesting evidence of the nature of the problems which engage the attention of the profession and the Courts in the Union of South Africa. The second number of the current issue, lately received, contains articles on ‘Marriage and Promise to Marry,’ ‘Master and Servant,’ and on ‘The Law of Malicious Prosecution.’ On this last topic a lively controversy originated by Mr. R. P. B. Davis of the Cape Bar in the August number of last year is still in progress. The impulse to the discussion was given by the decision of the Cape Provincial Division in the case of *Lefdahl v. Dredge* (1 C.P.D. 452). The cause of action was malicious arrest and false imprisonment. In the lower Court the magistrate, after hearing evidence for the plaintiff, granted absolution from the instance without calling upon the defence. On appeal to the Provincial Division, the Court, dealing with the question of malicious arrest, held that ‘upon the evidence there is nothing to show that the defendant honestly believed that the plaintiff was liable to imprisonment, and the absence of such proof is in itself some proof of malice. It is sufficient proof of malice to render the defendant liable in damages until he has rebutted it.’ The case was accordingly remitted to the lower Court to give the defendant the opportunity of disproving malice.

“The view of the law above expressed by Judge-President Maasdorp, was called in question in his article by Mr. Davis, as inconsistent with the law laid down in *Abrath v. North-Eastern Railway Co.*, 11 App. Ca. 247, which it seems is substantially identical with the law of South Africa (*Hart v. Cohen*, 16 S.C. 363). In the following number Mr. Centlivres, also of the Cape Bar, argued that Mr. Davis’s apprehensions were unfounded. In the February number of the present year Mr. Centlivres is supported by an anonymous correspondent, while another contributor, as the result of an historical inquiry, concludes that whatever the Roman-Dutch Law of Holland may have been (he suggests that the Dutch jurists of the seventeenth and eighteenth centuries were unable to decide between two inconsistent theories), it was widely different from the law of England

or the Anglicised law of South Africa. Mr. Davis now retorts upon his critics, who, he maintains, are confounding 'may' with 'must.'

"The jury or a judge deciding issues of fact MAY infer malice from the absence of reasonable and probable cause. To say that in the absence of rebutting evidence this inference MUST be drawn is, Mr. Davis contends, to rewrite the principles laid down in Abrath's case so as to read: 'the plaintiff must establish (1) that he was innocent of the crime of which he is accused, and (2) that the defendant instituted the proceedings without reasonable and probable cause. If the plaintiff is successful in so doing, then (3) the defendant must prove that he was not actuated by malice. The onus of the first two of these issues is on the plaintiff, but when the plaintiff has discharged that onus, the onus of the third issue is on the defendant.'

"If Mr. Davis is correct there is no previous decision either in this country or in South Africa which covers the case 'where the plaintiff has proved bare absence of reasonable and probable cause and no more and the defendant has made no reply whatever.'"



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